Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

JOAQUIN ALVARADO and JORGE LOPEZ,
Respondents.

On Petition for a Writ of Certiorari to the
California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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129 pp

QUESTIONS PRESENTED

Does a criminal defendant have an absolute right to the names of witnesses against him under the Sixth Amendment's confrontation clause and the due process clause of the Fourteenth Amendment to the United States Constitution?

If not, can preservation of a witness's life justify nondisclosure of the witness's name?

If so, do the threats made by defendant Alvarado and others to kill the witnesses, including the stabbing of one witness, and the trial judge's findings concerning the ability and willingness of the Mexican Mafia to find and kill these witnesses, support a waiver of the right to confrontation?

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On Petition for a Writ of Certiorari to the California Supreme court

PETITION FOR WRIT OF CERTIORARI

The People of the State of California respectfully petition for a writ of certiorari to review the judgment of the California Supreme Court, in this case.

OPINION BELOW

The opinion of the California Supreme Court (App., *post*, A-1 to A-45) is reported as *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 99 Cal. Rptr. 2d 149 (2000). The superseded opinion of the California State Court of Appeal (App., *post*, A-59 to A-85) is reported as *Alvarado v. Superior Court* 52 Cal. App. 4th 939, 60 Cal. Rptr. 2d 854 (1997).

JURISDICTION

The California Supreme Court entered its judgment on August 17, 2000. App., *post* A-48. It modified that opinion and denied a rehearing on November 15, 2000. App., *post* A-46 to A-47. Title 28, United States Code, section 28 U.S.C. § 1275 (a) (1993) confers jurisdiction on the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

The appendix, *post*, contains the text of California statutes involved in the issues in this case.

STATEMENT OF THE CASE

On February 6, 1993, Jose Uribe, an inmate at the Los Angeles County Jail, was murdered in his cell. A complaint was filed charging defendants Joaquin Alvarado and Jorge Lopez with the first-degree murder of Uribe. A third defendant, Frank Marquez, was also charged but was not a party to the appellate proceedings.

Later, a superceding indictment was filed charging defendant Alvarado with murder alleging a prior-murder special circumstance, and conspiracy to commit murder; and charging defendant Lopez with murder, conspiracy to commit murder, and possession of a shank while in custody. (CAL. PENAL CODE §§ 187; 190.2, subd. (a)(2); 182, subd. (a)(1); 4574, subd. (a).) The People are seeking the death penalty against Alvarado but not against Lopez. Three witnesses testified anonymously before the grand jury. Respondents filed a motion for disclosure of their names, which was denied.

Alvarado and Lopez petitioned the California Court of Appeal, Second District, for a writ of mandate challenging the trial

court's ruling. The court of appeal summarily denied the petition, but the California Supreme Court granted a petition for review and ordered the matter transferred to the court of appeal with instructions to that court to issue an alternative writ. The court of appeal issued the alternative writ but remanded the case to the superior court to correct the record. Alvarado and Lopez petitioned the court of appeal. After again hearing oral argument, the court of appeal issued a published opinion. A two-to-one majority denied the requests for a peremptory writ and upheld the superior court's order permanently denying Alvarado and Lopez access to the witnesses' names.

Alvarado and Lopez again petitioned the California Supreme Court for review. Review was granted. After hearing oral argument, the California Supreme Court issued an opinion overturning the permanent non-disclosure of the witnesses' names but allowing the trial court to enter a new order precluding disclosure pre-trial. Petitions for rehearing were denied on November 15, 2000, and the opinion was modified on that date. App., *post*, A-46 A-47. The California Supreme Court also issued its remittitur to the court of appeal on November 15, 2000. App., *post*, A-48. The court of appeal has granted the People's request to stay the issuance of its remittitur to the superior court, effectively staying the murder trial until such time as proceedings are concluded in this Court. App., *post*, A-86.

A. The Facts Concerning the Crime and the Decision to Protect the Identities of the Witnesses

On February 6, 1993, the victim, Jose Uribe, was housed at the county jail in Module 3400, Row D, Cell 10. Three witnesses, also housed at the county jail, testified as Witnesses 1, 2, and 3 before the grand jury concerning the crime. Witness 1 was housed in Module 3400, Row D, Cell 12. Witness 2 was housed in Module 3400, Row D, Cell 11. Witness 3 was housed in Module 3400, Row A, Cell 3. Petitioner Lopez was housed in Module 3400, Row C, Cell 1. Defendant Marquez was housed in Module 3200, Row B, Cell 11. Petitioner Alvarado was housed in Module 3700.

Deputy Sheriff Miguel Cervantes testified that on February 6, 1993, his attention was drawn to Alvarado because he was in the

hallway of the 3200 and 3400 Modules, although he was housed in the 3700 Module. Cervantes saw Alvarado in this location at about 10:30 a.m.

Just before noon, a lock-down of the jail was ordered when Uribe was found dead in his cell. Deputy Sheriff Matthew Monterosso testified that he was helping a criminalist collect evidence when he saw an inmate stick his arm through the bars of his cell, holding a small piece of paper, attempting to get the deputy's attention. When the deputy looked, the inmate threw the piece of paper on the floor. The deputy walked over casually and picked up the piece of paper. He attempted to draw as little attention to himself and the inmate as possible thinking that the inmate may have witnessed the murder. The note contained the words "top secret" and was given to the senior deputy in charge, Senior Deputy Stone.

Testimony of Witness 1

Witness 1 dropped the piece of paper. When he passed the note, he knew that he had placed himself in danger of being killed. Witness 1 identified a page of notes he had taken to remind himself of what he had seen and heard, including a diagram of from where he thought the noise of the fight had come.

Witness 1 was housed in Module 3400 on February 6, 1993. He could not remember exactly, but he believed he was in either Cell 12 or 11. On February 6, 1993, his cellmates were two Hispanics: one he knew as "Thumper"; he did not remember the name of the other. He did not go to lunch that day. During the morning, his Hispanic cellmates were contacted by a Hispanic trustee. He remembered that the Hispanic trustee had a thick, long mustache. He could not recall whether the trustee wore glasses. The trustee asked one of the Hispanic cellmates for an extra set of blue jail clothing. Witness 1 gave Thumper a shirt. At that time one of the Hispanics said, in conjunction with the need for an extra set of jail clothing, "'poor Rata.'" Witness 1 also stated that a "Rata" is a snitch and that "Ratas" are usually killed in jail. He gave his cellmate a shirt in order to curry favor with the Hispanics, since he was one of only one or two whites on the tier. Witness 1 then described a group of perhaps five people who walked towards

his cell. One of them was short and wore a gold cross on a gold chain around his neck. Another individual was taller and had a mustache and a short ponytail. During lunch, Witness 1 heard a fight take place two cells away from his cell, the same cell which the short Hispanic with the gold chain and the taller Hispanic with the ponytail had entered. He heard grunts, moans and someone asking for help. He thought nothing of it, thinking it was just a guy being beat up for whatever reason. The fight may have lasted five to seven minutes. The fight occurred while the rest of the inmates were at lunch. When the fight ended the gate to his cell was still locked. About 15 minutes passed between the end of the fight and the opening of his cell.

Witness 1 identified a photograph of Lopez. He also testified that he had been placed next to Lopez in solitary confinement. Witness 1 identified a photograph of Marquez as the trustee, although on August 18, 1995, he chose the photograph of a different inmate as the trustee. The inmate wearing a gold cross on a gold chain was Alvarado.

Testimony of Witness 2

Witness 2 testified that on February 6, 1993, he was in the custody of the county jail awaiting transport to state prison for receiving stolen property. On February 5, 1993, he had been on a bus handcuffed to Lopez. That night he was assigned to Cell 11, Row D, Module 3400. Between 6:30 and 7:00 in the morning of February 6, 1993, a Latino trustee came to the module and called to the Latinos in Cell 11. Witness 2 does not speak Spanish but he understood some words. He overheard the trustee state: "'"Rata" fight going down. Be out of the cell.'" Witness 2 explained that a "snitch" or a "Rata" was always in danger of being killed in jail. Witness 2 also explained that the jail is rigidly divided along racial lines with Latinos, blacks and whites keeping to themselves, definitely not interfering with each others' disciplinary problems. The trustee had given his Latino cellmates instructions to stay away from Cell 10 next door. A black trustee came by and told other black inmates: "'Don't come down to this end of the row.'" These instructions were followed. On his way back from breakfast, Witness 2 noticed that there were no blacks on his end of the row. They were all in Cell 5 or lower. Witness 2 went back to Cell 11, at

which time he heard arguing. He heard the word "Rata" again. The people in the adjoining cell were arguing in both English and Spanish. He could make out that someone had "ratted" on someone else in the City of Pacoima and it had something to do with a hamburger stand. During the argument, lunch was called. Witness 2 did not go to lunch that day, but he stepped out of his cell briefly and walked down the hall and back. Inside Cell 10 he saw three Hispanics. One of them was Lopez. Another he recognized by face, but not by name. The third was assigned to Cell 10. Lopez and the other Hispanic he recognized were not assigned to Cell 10. When he returned to his cell everyone had exited for lunch. He then heard the sound of a fight next door in Cell 10. He heard punches being thrown and bodies being thrown against the wall. Someone hollered for a deputy. Someone else said, "'You are a "Rata"; it was you.'" During the fight, other inmates made noises such as screaming, hollering and whistling in order to drown out the cries of the victim. After a few minutes it was over. Witness 2 also heard whispering after the fighting stopped and heard the sound of someone being dragged across the floor.

About five minutes later, the inmates returned from lunch and the Latino trustee who had instructed the Latino inmates earlier came back onto the row. The cell doors opened to admit the inmates coming back from lunch. Witness 2 stepped out and saw Lopez and the other inmate whose name he could not now remember in Cell 10, and the trustee standing outside Cell 10. As Witness 2 watched, Lopez pulled his shirt off and gave it to the trustee. The shirt had blood on it. At that time the trustee told Witness 2 to go back into his cell, that what happened did not involve his people and that he, Witness 2, was to mind his own business. Witness 2 went back into his cell. Lopez and the other Hispanic exited Cell 10. Witness 2 glanced inside the cell and saw a body under the bed. Witness 2 was subsequently shown photographs on February 6, 1993. He picked out a photograph of Marquez as the trustee who gave the message to the other Latinos. He picked out a photograph of Lopez. On a subsequent day, he picked out a photograph of Alvarado as the other inmate who was in the cell with Lopez at the time of the murder. On February 6, 1993, Witness 2 had chosen a photograph of an inmate other than Alvarado as depicting the

inmate who had been in the cell with Lopez at the time of the murder. After viewing both photographs, Witness 2 stated that he had been mistaken, that Alvarado was the person who was in the cell with Lopez and that the other photograph merely resembled him.

Testimony of Witness 3

Witness 3 testified that he, too, was in the county jail in February 1993. He was housed in Cell 3, Row A of Module 3400. He was a trustee at that time and had access to areas other than his own row. It was his job to sweep Modules 3200 and 3400. While sweeping that day, he saw a young man carrying a "shank" heading towards Module 3400. He recognized that person as an Hispanic trustee. He saw him wrap the shank in a shirt. Witness 3 saw the Hispanic trustee hand the shirt up to another Hispanic in Module 3400. This occurred during the commissary or store hours shortly before the inmates took lunch. The trustee who handed off the shirt with the shank in it was known to Witness 3 as Boscoe. After lunch, Witness 3 saw the Hispanic trustee retrieve a blue shirt by reaching up to Row D of Module 3400 from Row B. Another inmate, Larry Tate, asked Witness 3 to get a deputy because there was a man down. Witness 3 looked in Cell 10 and saw the body under the bed. Witness 3 was eventually shown a set of photographs and picked Marquez as Boscoe, the trustee who handed off and picked up the shirt.

Testimony of Detective Mary A. Bice

Sheriff's Detective Mary A. Bice testified that she was the primary investigating detective in the death of Jose Uribe. On February 6, 1993, she went to the Men's Central Jail where she saw Uribe's body in Cell 10, Row D. Three shanks were found in a nearby storage closet. On February 6, 1993, everyone on Row D in Module 3400 was photographed. On February 8, 1993, the investigation expanded beyond Module 3400, and Detective Bice acquired a photograph of Alvarado, which she marked as 13. Sets of photographs were shown to the witnesses. On February 8, 1993, Witness 2 identified photograph 13. He told Detective Bice that on February 6, 1993, he had misidentified the person depicted in photograph 13 by picking a different photograph. However, on the

8th he was sure that the person in photograph 13 was one of the persons he saw, not the previously identified person. A photograph marked 7 depicted Frank Marquez. A photograph marked 8 depicted Jorge Lopez. Witness 1 also identified Juan Lopez, his cellmate, as being one of the five Hispanics that he saw enter Cell 10. Juan Lopez is not Jorge Lopez. Witness 1 also identified Alvarado as the person wearing the gold cross. Juan Lopez, as opposed to Jorge Lopez, was never identified as being involved in the actual attack against victim Uribe. Jorge Lopez was identified by Witness 2 as one of the perpetrators in the attack. Witness 3 was not shown any photographs on February 8, 1993, but Detective Bice was able to identify the trustee named Boscoe as Frank Marquez.

Lopez's Possession of Shanks

Deputy Sheriff Paul Shigo testified that on November 16, 1993, at about 7:30 p.m., he searched Jorge Lopez's cell and found a shank. The shank was made of metal, five inches long, one inch wide and sharpened at one end. Deputy Sheriff Steven Turpen testified that on March 30, 1994, at 12:15 p.m., he searched Lopez's cell and found a shank. That shank was a piece of metal sharpened at one end. He saw Lopez attempting to hide this shank in his anal cavity. Failing in this, Lopez hid the shank in the ceiling light.

Coroner's Testimony

Deputy County Coroner Irwin Golden testified that on February 8, 1993, he conducted an autopsy on the body of Jose Uribe. He counted 37 stab wounds to the head, neck, chest and back. There were also signs of blunt trauma, abrasions and bruises on the head and face. The stab wounds were compatible with the shanks recovered from the storage closet. The cause of death was multiple stab wounds, particularly those to the chest that penetrated the heart and lungs.

B. The Findings of the Superior Court

The superior court held in camera hearings[1] in order to determine whether the defense would be given the witnesses' names

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[1] CAL. PENAL CODE section 1054.7 (West 2001); see App., *post*, A-89.

and whereabouts. The California Supreme Court summarized the trial court's findings. The complete statement reads:

> At the three in camera showings -- and there were in camera hearings on March 30th, April 21st and May 4th of this year -- the evidence presented clearly established that witnesses one through three are in serious danger as a result of their participation in this case and that the disclosure of their names would likely increase the danger to them. Several facts support this conclusion, including the following: [¶] One, the homicide is believed to have been ordered by the Mexican Mafia, a notorious prison gang and that the defendants, who are not members of the gang, committed the homicide to gain favor with the Mexican Mafia. [¶] Two, the Mexican Mafia is well-known for retaliatory acts against government -- pardon me, against informant and government witnesses, including murder. [¶] Information disclosed in camera documented twelve incidents of murder or attempted murder at the county jail of inmates from 1988 through 1991 which were committed by or at the direction of members of the Mexican Mafia. The additional five murders linked to the Mexican Mafia during this period of time were committed on persons who were not incarcerated. [¶] The Mexican Mafia is believed to have ordered the murders of witnesses in protective custody and incarcerated in other states in addition to California. [¶] Three, the Mexican Mafia has an excellent intelligence network which includes sources in several public agencies and is able to obtain confidential information. [¶] For example, the Mexican Mafia was able to obtain the home addresses of certain police officers, even though the addresses were protected from disclosure by the Department of Motor Vehicles' cover. [¶] In a notorious murder case in which the Mexican Mafia was attempting to find a government witness who had been given a new name, detectives determined that searches of government computers had been made trying to locate the individual under his new name. [¶]

Penetration by the Mexican Mafia of Penal institutions is so extensive that one in camera witness described the organization as having quote, de facto control, [un]quote, over all penal institutions in California. [¶] Four, the danger of the Mexican Mafia or the danger the Mexican Mafia poses to government witnesses is extreme. In camera a witness stated the Mexican Mafia has ordered so many hits and there are so many witnesses in protective custody that we cannot adequately protect them all. [¶] Five, the Mexican Mafia requires documentation which identifies an individual as a government witness before a contract to kill the witness is approved. The procedure for issuing contracts was described as follows: [¶] For contracts to be issued one Mexican Mafia member alone cannot give the contract. He has to have that contract approved. [¶] The contract is approved in a manner where they meet, two or three members meet. They are presented with evidence. They have like what you would call a trial. It is informal. This evidence includes transcripts or paperwork from that [sic] would indict this person who has been a witness and that is why the name is so important. [¶] Six, a witness in the instant case was attacked and cut in jail after the killing in this case. The attacker was a member of the prison gang aligned with the Mexican Mafia and warned the witness not to testify. [¶] One of the defendants in this case threatened a witness while the witness was in protective custody and told the witness somebody would get him. [¶] Someone wrote on a wall while a witness was in a court holding cell that the witness was dead. And that the witness was a snitch at the time when the witness was in protective custody. [¶] Seven, in the instant case the homicide committed was committed in a manner which suggests highly organized criminal activity involving several persons. [¶] The victim arrived at an institution a single day or at most two days before the killing. This fact suggests that the group responsible for his killing had intelligence and organization. It was

known that the defendant [sic] was coming, where he would be and how to get to him. [¶] This sophisticated criminal activity involving the obtaining of shanks which, of course, is illegal to possess in the jail, getting the shanks to the floor they could be used, obtaining the extra clothing so the killer could rid themselves of the blood sustained [sic] clothes, getting rid of the bloodstain[ed] clothes. [¶] The sophistication of the killing indicates no one is safe inside the county jail system and I think that also obtains to persons who are in prison within California and in prisons outside of California. [¶] Based on the foregoing and the other facts disclosed to the court in camera it is clear that the witnesses one through three are in danger and that disclosure of their names would increase the risk of possible danger to them with a resulting possible los[s] of evidence; that is, their testimony which has not been preserved in any usable way. [¶] So I find good cause has been shown to support that there is a danger to these witnesses.

But I must say I continue to be troubled by the People's request to not turn over the names. It is a difficult issue for me. And even though I think good cause exists, I certainly am persuaded by Mr. Crain's argument and the arguments of counsel that for them to investigate the case in this situation, it makes it almost impossible to investigate without the names. And it's just very difficult for the court to know what is an appropriate balancing here, because it's clear to me that the witnesses are in danger. It's clear to me that the People have made a sufficient showing in camera to persuade me that the witnesses cannot be protected in their current situation or surroundings. [¶] Now, I am not as sufficiently convinced that the name is of critical importance in the investigation for the reason [the prosecutor] Ms. Lentz says. I don't think the [p]eople in jail necessarily know the name, the true name of the person that is next to them. [¶] But, this whole issue of how do you investigate this case, how do you defend against it is one that is, of

course, very troubling. And I do see some differences between our situation and the *Piedrahita* case. [¶] In the *Piedrahita* case [*People v. Superior Court (Piedrahita)*, 34 Cal. App. 4th 508, 40 Cal. Rptr. 2d 335, ordered depublished August 17, 1995 (S046137)] clearly you had a twelve year old child or boy who had no questionable criminal history or credibility issues at all in that case. And I think that the court was saying, gee, here's a twelve year old boy from a prominent family. The family is going to be disclosed. There is obvious danger to the child and to the family. He is only a cooperative witness. Why should we put him at such risk in this case when he just happened to be somewhere and happened to see something. [¶] In a sense the same argument can be made in this case where these three witnesses just happened to be in the jail on the occasion of the killing, that at the time of the killing they each agreed to testify as to what they saw. They went before the grand jury and did disclose what they saw. [¶] Counsel say that they cannot investigate this case without the name. The People are bending over backward to give them everything they can give except the name. The name becomes very important in the People's consideration because of the testimony in camera that the Mexican Mafia requires, quote, documentation, [un]quote, before they will approve a hit on someone. [¶] Now, that flies a little bit in the face of the fact that one of the witnesses in this case was allegedly attack[ed]. I mean, why would someone attack a witness unless it was clear that a contract of some kind had already been given on the witness if indeed he was a member of the Mexican Mafia, but -- or if the hit was at the request of the mafia. So there are troubling aspects of this case. And I am really troubled by what I perceive to be strong positions on both sides. [¶] I have given a lot of thought to weighing the concerns and the considerations here. Let me go [sic] to talk about the 6th amendment concerns. They also play a part. [¶] And as *Piedrahita* stated, the standard of *Smith*

versus Illinois [390 U.S. 129 (1968)] has a core purpose which is to prevent a criminal conviction based on the testimony of a witness who remains a quote, mere shadow in the defendant's mind [unquote]. And we are required to harmonize the goal of the confrontation clause by placing limits on the kind of evidence that may be received against the defendant with the societal interest in accurate fact-finding. [¶] And they are drawing on U.S. versus Bourjaily that -- that is B-O-U-R-J-A-I-L-Y at 483 U.S. 171. [*Bourjaily v. United States*, 483 U.S. 171, 182 (1987)]. Alford, [*Alford v. United States*, 282 U.S. 687 (1931)] another case also speaks of the prejudice which ensues from a denial of the opportunity to place the witness in his proper setting. [¶] In this case, I am not as concerned about that because the witnesses were all in custody and information about their custodial status, prior criminal history, et cetera, has been provided to the defense. So I have to make a decision on this case. I think that the statutes in California as revised by Proposition 115 clearly mandate that we take into account the witness's safety as a significant concern. [¶] I am very concerned about threats to the witnesses in this case. Actually, in light of the fact that we have had one attack on a witness and another effort to intimidate a witness in this case, I think given that and the other factors, that there is a good cause under the 1054 statutes to support the order that [the] People are requesting. [¶] I do so with some hesitation. It is a question of trying to balance the interests of both sides. [¶] I presume that the losing side in this dispute will take a writ and perhaps we can get some better direction from the appellate courts on this. But I think based on the evidence that I have seen that the People's request for a nondisclosure order is appropriate and I am going to[] grant it. So the order is granted. [¶] The request for the names of the witnesses to be disclosed at this time is denied. I am going to -- I think I will just leave it at that. [¶] The People will, of course, provide the witnesses for interview and

examination thirty days before a trial date.

(Reporter's Transcript of the proceedings held on 7/21/95, 519:8-528:28, *Alvarado v. Superior Court*, 23 Cal. 4th 1121 (2000) (No. SO59827).)

C. The Superior Court's Orders on Remand

On May 10, 1996, the trial court issued a minute order correcting its order of July 21, 1996, *nunc pro tunc*, by substituting the following language:

"People's request to withhold the names of witnesses from the defense is granted. The witnesses will be made available for interview by defense counsel 30 (thirty) days before trial. The witnesses are not required to state their names, but, may do so at their own volition."

On July 18, 1996, the trial court further clarified its minute order of May 10, 1996, *nunc pro tunc*, by adding the following language:

"Witnesses may state their true names at their own volition during the interview or during trial. They will not be required to state their true names at either event, unless they themselves volunteer their true names."

D. How the Federal Question was Presented Below and Resolved by the California Supreme Court

The California Supreme Court found that the defendants had conceded the trial court's finding that disclosure would pose a serious danger to the witnesses and constituted "good cause" to deny disclosure under California state discovery statutes.[2] The California Supreme Court then stated: "[B]ut they [defendants] maintain that, under the circumstances of the present case, the trial court's order -- upholding the prosecution's authority to withhold disclosure of the witnesses' identities at trial -- violates their rights, as guaranteed by the United States Constitution, to due process of law and to confront the witnesses against them. The resolution of this case turns upon these federal constitutional questions." App., *post* at, A-14 to A-15. This quotation is followed by footnote 4

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[2] CAL. PENAL CODE section 1054.7 (West 2001); see App., *post*, A-89.

which reads: "Defendants have not raised any claim under the California Constitution, and therefore we need not and do not address any state constitutional issue." *Id.* at A-15 n.4.

Based on both federal and state cases, the California Supreme Court stated that non-disclosure of the witnesses' names before trial was governed by due process and was not required where sufficient evidence of danger to the witnesses was presented. App., *post*, A-17 to A-18.

Turning to non-disclosure of the witnesses' names at trial, however, the California Supreme Court found that the same evidence that presented serious danger to the witnesses and sufficed to support an order of non-disclosure of their names prior to trial, did not suffice to preclude disclosure of their names at trial. App., *post*, A-18 to A-39. This decision was based squarely on the court's reading of the confrontation clause of the Federal Constitution. *Id.* at A-19. The California Supreme Court acknowledged that the right to confrontation was not an absolute right. *Id.* at A-22. The court below followed the reasoning of *Alford v. United States*, 282 U.S. 687 (1931), and *Smith v. Illinois*, 390 U.S. 129 (1968) although these cases did not involve a showing of danger to the witnesses. App., *post*, at A-22 to A-24.

The California Supreme Court distinguished all of the state and federal cases cited for the proposition that the defendant's right to know the names of the witnesses could be balanced against the danger to the defendants on the ground that none of these cases sanctioned non-disclosure of a crucial witness's name at trial. *Id.* at A-34.

The California Supreme Court acknowledged that the trial court had properly found that the witnesses faced mortal danger from the Mexican Mafia, but held that the difficulties which the defendants would face in obtaining complete information deprived them of their right to fully confront the witnesses, notwithstanding the fact that the witnesses would appear before the defendants without disguises at trial. *Id.* at A-35 to A-39. The court of appeal also stated that non-disclosure would severely limit the defendants' ability to investigate the case against them, but found that the clear danger of murder at the hands of the Mexican Mafia outweighed

these difficulties. *Id.* at A-51.

The California Supreme Court also discussed the dissenting opinion in the court of appeal, which criticized the majority for stating that the danger faced by the witnesses outweighed the constitutional rights of the defendants. The dissent is also cited for the proposition that the non-disclosure order would ultimately be vitiated by the fact that the witnesses would testify in open court, thus subjecting them to the same danger after trial. *Id.* at A-10 to A-11.

However, in addition to approving the order preventing disclosure of the names prior to trial, the California Supreme Court also approved other methods of protecting witnesses, including closing the courtroom during an endangered witnesses' testimony. *Id.* at A-41 to A-42.

The California Supreme Court also stated that the discovery provided by the people was not sufficient to permit effective cross-examination. *Id.* at A-36 to A-38. However, in its modification to the opinion, the court below detailed more discovery provided by the People, including the witnesses' custodial status, police reports of their prior crimes with identifying information deleted, reports of interviews with other inmates, as well as the names and photographs of the other 33 inmates who resided in the module where the murder occurred and the names of every other inmate who resided in a nearby module of the county jail. This modification, however, did not change the judgment. App., *post*, A-46 to A-47.

Both the court of appeal and the California Supreme Court refused to find that the defendants had waived their confrontation rights. The court of appeal did not address the issue of waiver because it was not raised in the trial court. App., *post*, A-64. The California Supreme Court stated that the waiver issue had not been raised in the trial court but preceded to address the issue on its merits. The California Supreme Court stated that, although evidence was taken that Alvarado had threatened a witness, no evidence linked Lopez to that threat. No direct evidence linked either Lopez or Alvarado directly to the stabbing of one of the witnesses and/or a separate threat to a witness. Also, since the

evidence against Alvarado was taken in camera and no waiver argument was made in the trial court, Alvarado had no opportunity in the trial court to contest the allegation. Finally, the court noted that the trial court found that the danger to the witnesses was posed by the Mexican Mafia and not by the individual defendants. A-38 to A-39, n.11.

REASONS TO ALLOW THE WRIT

The court below agreed with the trial court's findings that the three witnesses face mortal danger from the Mexican Mafia. The question for decision was posed by Justice White in a concurring opinion in *Smith v. Illinois*, 390 U.S. 129, (1968). In *Smith*, this Court reversed a narcotics conviction because the trial court had erred in allowing an informant to refuse to give his real name on cross-examination. In that case, the state had not attempted to make a showing of danger to the physical safety of the informant. In a concurring opinion, Justice White, joined by Justice Marshall, opined that under circumstances that establish that a witness would be endangered by disclosing his or her name, a trial court could exercise its discretion to prevent disclosure. *Id.* at 133-134. This issue has been the subject of a wide variety of opinions in both federal and state courts. It is an issue of great importance which the People believe is ripe for decision by this Court. SUPREME COURT RULES, rule 10 (c). In addition, the results reached by the lower federal courts and the state courts are in conflict based on whether the courts below employed a balancing test or a waiver argument; and based on whether the witness was a crucial witness, or would give cumulative or collateral testimony. *Id.*, rule 10 (b). The decision also agrees that neither due process nor the right to confrontation preclude withholding the names pre-trial even though the non-disclosure may preclude the defense from making as complete an investigation as possible.

I. It Is Appropriate to Allow the Writ Before Trial

The circumstances here demonstrate the need in this case for review before trial. The decision below of the California Supreme Court is final, CAL. RULES OF COURT, rule 24 (a), and constitutes the law of the case, *see Kowis v. Howard*, 3 Cal. 4th 888 at 894, 12 Cal. Rptr. 2d 728 (1992), on the federal issue.

However, though Alvarado and Lopez await their trial for murder, once the trial commences, the federal issue "will not survive for this Court to review, regardless of the outcome of the proceedings on remand." *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 (1987). If the Court denies review at this point and the prosecution then secures convictions, the People "will have prevailed and will have no basis to seek review." *Ibid.* If, on the other hand, the defendants are acquitted, the People "will be barred from seeking review by the Double Jeopardy Clause. [Citations.] Therefore, if this court does not consider the constitutional claims now, there may well be no opportunity to do so to the future." *Ibid* (footnote omitted). The California courts have considered the federal issue here of such importance that it has been litigated for seven years prior to trial. No greater prejudice will befall the defendants by virtue of any delay caused by consideration in this Court.

II. The Intimidation and Murder of Witnesses is an Issue of Grave National Importance

On August 17, 1992 in Pomona, California, fourteen-year-old Eduardo Samaniego, a clean-cut Little-Leaguer, was shot to death after testifying against two gang members at a preliminary hearing. Sheryl Strolberg, *Some Crime Witnesses Pay High Price for Civic Duty*, LOS ANGELES TIMES, August 30, 1992, at A-1. On May 22, 2000 in Providence, Rhode Island, fifteen-year-old Jennifer Rivera was a key witness in a gang related murder. She was shot in the head execution-style on the eve of trial. Other witnesses told the police that they would no longer agree to testify. Cindy Rodriquez, *R.I. Witness, 15, Dies After Being Shot on Eve of Murder Trial*, BOSTON GLOBE, May 23, 2000, at A-1. On January 8, 1999 in Bridgeport, Connecticut, eight-year-old Leroy Brown, Jr. was a witness to a gang-related murder. Before trial, he and his mother, Karen Clarke, 30, were murdered. State prosecutors had sought to keep Leroy's identity confidential, but the court ordered his name divulged. Fred Musante, *Boy Is Murdered and State Passes a Tough Witness Law*, NEW YORK TIMES, June 27, 1999, at 14CN-1.

In April 1995 in Long Beach, California, the People learned of a child witness to a gang-related murder that was in trial. The People wished to use the witness, but feared for his safety and the

safety of his family. An in camera hearing was held and the trial judge found that the child was in danger, but nonetheless concluded that the child's name must be divulged. The California Court of Appeal reversed the trial court's order in an opinion that was later de-published by the California Supreme Court. The child testified using an alias and was not harmed. *People v. Superior Court (Piedrahita)*, 34 Cal. App. 4th 508, 40 Cal.Rptr. 2d 335 (1995), ordered not published. If the procedures followed in the instant case and in *Piedrahita* had been used in the foregoing cases, these children and Karen Clarke might be alive today. This is what is as stake in this case; the very lives of citizens who, through no fault of their own, become witnesses to serious crimes perpetrated by gangs that use such intimidation to rule over many urban neighborhoods and over inmates in many penal institutions.

The intimidation and murder of witnesses is a growing concern. Paul T. Markland, *Comment: The Admission of Hearsay Evidence where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 AM. U.L. REV. 995 (1994). As stated in a recent report prepared by the Department of Justice: "Prosecutors, police officers, judges and victim advocates agree that witness intimidation is widespread, increasing, and having a serious impact on the prosecution of crime across the entire country." U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Preventing Gang and Drug - Related Witness Intimidation* <http://www.ncjrs.org/txtfiles/163067txt> (November 1996) p.12.

As noted in the California Supreme Court opinion below, the People reported that in the previous five years, special circumstance allegations allowing a verdict of death based on the alleged murder of witnesses had been filed in 25 cases in Los Angeles county alone. Over 1600 cases of witness intimidation had been filed during the same five years. App., *post*, A-39 to A-40, n.13. Specifically, regarding the Mexican Mafia and other California gangs, the opinion below briefly discusses their willingness to kill. *Ibid.* The court of appeal opinion discusses the Mexican Mafia and other gang intimidation at length. A-67 to A-72.

In appropriate circumstances, such as the instant case,

witnesses' names must be protected in order to maintain the efficacy of the criminal justice system as an institution of government, which has as its foremost responsibility the protection of the lives of its citizens. *See*, *In re Quarles*, 158 U.S. 532, 536 (1895) [the right of a citizen who informs of a crime to protection against violence is not dependent on any constitutional amendments; it proceeds from the creation by the constitution itself of a national government].

III. The Decision Below Involves an Issue of First Impression that Should Be but Has Not Been Settled by This Court

This Court has not addressed the issue posed by the concurring opinion of Justice White in *Smith v. Illinois*, 390 U.S. at 133-134. As stated by Justice William Brennan, "In the rare case, the denial of all discovery may be compelled to protect the safety of witnesses or prevent apparent perversion of the judicial process." Brennan, *Comment: The Criminal Prosecution: Sporting Event or Quest for Truth*, 3 WASH. U.L.Q. 279, 292-295 (1963). In this case, the witnesses will be confronted by the defendants. The People seek to preclude discovery of the witnesses' true names, gang monikers, and their whereabouts. All other discovery has been provided to the defense. The People provided the defense with the grand jury transcript and extensive discovery as listed in the modification to its opinion issued by the California Supreme Court. App., *post*, A-46 to A-47.

The California Supreme Court agreed with the People, the court of appeal, and the trial court that the witnesses face mortal danger from the Mexican Mafia if their names and/or photographs are divulged. Based on the evidence presented in camera and before the grand jury, including evidence that one witness had been threatened by defendant Alvarado, a witness had been stabbed in order to prevent his testimony, and a warning not to testify had been scrawled on the wall of a cell in which a witness was temporarily housed prior to his grand jury testimony, the California Supreme Court agreed that it was appropriate to deprive the defendants of the names, whereabouts and photographs of the three witnesses prior to trial.

Nevertheless, the same court refused to extend that

protection to the trial itself and beyond. The rationale used by the court was that although extensive discovery had been provided by the prosecution, there was no substitute for the names of the witnesses at trial.

However, a balancing approach was sanctioned by this Court to protect victims of sex crimes from further psychological abuse by being forced into the presence of their attackers. In *Maryland v. Craig*, 497 U.S. 836 (1990), this Court upheld the one-way closed-circuit televised testimony of a child witness based upon a finding of necessity, which did not allow the defendant to confront the victim face-to-face, but which did allow the defendant to view the victim on a television screen. The majority opinion stated, "'Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Id.* at p. 849, quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The three witnesses here face a high probability of death at the hands of the Mexican Mafia if their names are disclosed. This high probability can be balanced against the possibility that the defendants would gain further discovery if the names were released. The witnesses will testify before the defendants and will be cross-examined concerning the murder of Jose Uribe. Although both opinions below state that defense counsel's ability to investigate the case will be seriously diminished by the non-disclosure of the witnesses' names, the People have made available all of the discovery possible without divulging the names. App., *post*, A-46 to A-47, A-64.

Numerous federal cases have found that the concurring opinion in *Smith* supports a balancing of interests in deciding whether to disclose the names and addresses of witnesses. With the exception of the Third and District of Columbia Circuits, which have not addressed the question, all of the other federal Circuit Courts of Appeals have determined that the holding of *Smith* concerning a witness's name and address is not absolute. (*Siegfriedt v. Fair*, 982 F.2d 14, 17 (1st Cir. 1992) [*Smith* does not establish absolute rule of disclosure for true name and address of witness]; *United States v. Dyman*, 739 F.2d 762, 773 (2d Cir. 1984) [defendant not prejudiced by failure to learn witness's

address]; *United States v. Cavallaro,* 553 F.2d 300, 304 (2d Cir. 1977) [government's legitimate concern for witness's safety justified denying defendant correct address of witness]; *United States v. Persico,* 425 F.2d 1375, 1383-1384 (2d Cir. 1970) [fear for witnesses' personal safety justified trial court's refusal to disclose witnesses' correct address and place of employment]; *United States v. Marti,* 421 F.2d 1263, 1265-1266 (2d Cir. 1970) [defendants not deprived of right of confrontation and due process by court's refusal to order witness to disclose residence address]; *United States v. Baker,* 419 F.2d 83, 87 (2d Cir. 1969) [witness who had received threats to his life properly refused to disclose name and address of current employer]; *United States v. Bennett,* 409 F.2d 888, 901 (2d Cir. 1969) [no reversible error under *Smith* where witness not required to disclose place of employment]; *United States v. Jordan,* 466 F.2d 99, 101-102 (4th Cir. 1972) [failure to allow discovery of names of two eyewitnesses and continuance to investigate eyewitnesses when identity was known was not an improper diminution of right to cross-examine]; *United States v. Fischel,* 686 F.2d 1082, 1092-1094 (5th Cir. 1982) [withholding address of witness may be justified under certain circumstances]; *United States v. Mesa,* 660 F.2d 1070, 1075-1076 (5th Cir. 1981) [right to confront not violated by court's failure to conduct in camera hearing before refusing to order disclosure of witness's address]; *United States v. Hughes,* 658 F.2d 317, 321-322 (5th Cir. 1981) [ruling prohibiting disclosure of witness's address did not amount to plain error]; *United States v. Contreras,* 602 F.2d 1237, 1239-1240 (5th Cir. 1979) [reasonable fear for Drug Enforcement Administration agent's safety justified refusal to require disclosure of home address]; *United States v. Avalos,* 541 F.2d 1100, 1117 (5th Cir. 1976) [*Smith* did not establish "hard and fast rule" regarding questions about current addresses]; *United States v. Crockett* 506 F.2d 759, 762-763 (5th Cir. 1975) [government's strong reason to believe witness's life in danger justified refusal to disclose address]; *United States v. Alston,* 460 F.2d 48, 50-54 (5th Cir. 1972) [federal narcotics agent not required to disclose home address where reasonable fear of safety to witness and his family existed]; *United States v. Fife,* 573 F.2d 369, 377 (6th Cir. 1976) [*Smith* did not establish per se rule that a witness must always disclose residence

address]; *United States v. Olson*, 978 F.2d 1472, 1476-1477 (7th Cir. 1992) [trial court's failure to order disclosure of informant witness's address did not deny defendant his rights of due process and confrontation]; *United States v. Twomey*, 460 F.2d 400, 401-402 (7th Cir. 1972) [informant who was not chief witness to drug transaction not required to reveal true identity, residence and place of business]; *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) [right of defendant to have witness' true name, address and place of employment is not absolute where personal safety of witness is at issue]; *United States v. Springer*, 831 F.2d 781, 783 (8th Cir. 1987) [right to ask address-related questions is not absolute]; *United States v. Spector*, 793 F.2d 932, 937-938 (8th Cir. 1986) [informant not required to disclose correct address in open court]; *Clark v. Ricketts*, 958 F.2d 851, 854-855 (9th Cir. 1992) [right of confrontation not violated where defendant not permitted to elicit name and address of prosecution's "John Doe" witness on cross-examination]; *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1376-1377 (9th Cir. 1987) [no right to have home address of immunized government witness stated in court]; *United States v. Washington*, 797 F.2d 1461, 1474-1475 (9th Cir. 1986) [concerns about personal safety of former prostitute justified refusal to order disclosure of present address]; *United States v. Hernandez*, 608 F.2d 741, 744-745 (9th Cir. 1979) [no error in denying address of principal prosecution witness]; *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976) [trial court properly refused to require government informant to divulge true name, residence and phone number on witness stand]; *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972) [no violation of *Smith* by refusal to permit defendant to elicit correct name, residence and occupation of agent-purchaser of drugs]; *United States v. Cosby*, 500 F.2d 405, 407 (9th Cir. 1974) [*Smith* is not rigid rule of disclosure]; *United States v. Smaldone*, 484 F.2d 311, 318-319 (10th Cir. 1973) [refusal to allow defendant to elicit address of government informant was not error]; *United States v. Varella*, 692 F.2d 1352, 1355-1356 (11th Cir. 1982) [no fixed rule requiring disclosure of identity of informant].)

The California Supreme Court stated that none of these cases involved the withholding of information concerning a crucial

prosecution witness, and that to do so would be improper if the information is essential to the defendant's ability to conduct an effective cross-examination. App., *post*, A-34. In other words, if the witness is crucial to the prosecution's case, the defendant has an absolute right to the witness's name no matter the danger that will befall the witness. The court below stated further that in all cases in which the witnesses were crucial or where the prosecution failed to make a showing of danger to the witnesses, the courts have found that disclosure at trial is required.

Petitioner believes the Constitution is not that absolute for two reasons: First, cases where the prosecution made no showing are inapplicable. Second, the Fourth Circuit Court of Appeals has allowed the identities of crucial or key witnesses to be withheld based on the danger faced by the witnesses and their families. See Argument IV, *post*.

IV. The Decision of the California Supreme Court Conflicts with Fourth Circuit Court of Appeals Cases Concerning the Testimony of Crucial Witnesses, and Conflicts with Federal Court of Appeals Cases from Several Circuits Concerning the Waiver of Confrontation Rights

A. Fourth Circuit Cases Allow Crucial Witnesses to Testify under Aliases

The California Supreme Court's opinion stated that *United States v. Jordan*, 466 F.2d 99 (4th Cir. 1972), did not support the People's request for non-disclosure of the witnesses' names. The *Jordan* case is very nearly on point with the instant case. Two inmates who were eyewitnesses to a jailhouse assault were allowed to testify under aliases in order to protect them from danger in the *Jordan* case. (*Id.* at p. 102.) The court of appeals upheld the decision to preclude disclosure of the names because cross-examination was not curtailed at trial in any way and the ability to cross-examine was preserved by telling the defendant's attorney what the witnesses would testify to, and by providing the attorney with evidence of their felony convictions. *Ibid.* The court of appeals specifically stated that its decision was not based on the harmless error doctrine, although "it is worth mentioning that . . .

the victim's testimony positively identifying Jordan as his assailant was itself enough to sustain conviction. . . ." *Ibid.* The opinion does not state that the two eyewitnesses were not also key or crucial witnesses. Whether the jury would have found the defendant guilty based solely on the testimony of the victim is a subject amenable only to conjecture. The *Jordan* court also stated that the fact that the names might have allowed the defense to unearth something else with which to discredit the witnesses was not a sufficient ground to require disclosure of their names in light of the fact that the witnesses were impeached with their prior felonies. *Ibid.*

Although these three witnesses are crucial, unlike the two inmates in *Jordan,* they are not eyewitnesses. Their evidence is circumstantial, based on what they heard at the time of the murder and what they allegedly saw the defendants doing prior to and after the murder. Other witnesses, including sheriff's deputies, also testified to what they saw the defendants doing prior to the murder, and testified that they found the likely murder weapons. A sheriff's deputy saw Alvarado in the vicinity of the murder victim's cell at 10:30 a.m. The murder occurred during the noon hour. Alvarado was not housed where he was seen. Another deputy saw Marquez in the vicinity of Uribe's cell. Sheriff's deputies found Lopez in possession of "shanks" on two subsequent occasions. In addition, the defendants have the grand jury transcripts which detail what the witnesses will testify to. They also have the entire official criminal histories of the three witnesses, including the police reports prepared in their prior crimes, with identifying information deleted. They have the names and photographs of the cellmates and all of the prisoners in the module where the murder occurred and the names of all the prisoners in the modules where Alvarado and Marquez were housed. This was a jailhouse killing. The evidence provided is sufficient to place the witnesses in their appropriate environment, the county jail, while also preserving their lives.

In *United States v. Borda,* No. 96-4752, 1999 U.S. App. Lexis 9031 (4th Cir. May 11, 1999), an unpublished case, the United States Court of Appeal for the Fourth Circuit upheld the decision of the federal District Court allowing "a key government witness, [alias] 'Marco-Sucre,' to testify without disclosing his true identity, thus limiting [the defendants'] ability to cross-examine

him." (*Id.* at pp. 17-18.) The Fourth Circuit Court of Appeals stated:

> When a trial court is satisfied that there is an actual threat to a witness if his identity is disclosed, courts have held that it is proper to withhold this information. As long as enough information is provided to allow the cross-examiner to place the adverse witness in the proper environment, there is no violation of the confrontation clause. See *United States v. Spector*, 793 F.2d 932, 937 (8th Cir. 1986); *United States v. Mesa*, 660 F.2d 1070, 1075 (5th Cir. 1981); *United States v. Hansen*, 569 F.2d 406, 410 (5th Cir. 1978); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir.), cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 147 (1976).

Id. at p. 19.

B. The Intimidation Visited on the Three Witnesses by the Defendants Supports a Partial Waiver of their Confrontatión Rights.

The California Supreme Court stated that the waiver issue had not been raised in the trial court but proceeded to address the issue on its merits. The California Supreme Court stated that although evidence was taken that Alvarado had threatened a witness, no evidence linked Lopez to that threat. No direct evidence linked either Lopez or Alvarado to the stabbing of one of the witnesses and/or a separate threat to a witness. Also, since the evidence against Alvarado was taken in camera and no waiver argument was made in the trial court, Alvarado had no opportunity in the trial court to contest the allegation. Finally, the court noted that the trial court found that the danger to the witnesses was posed by the Mexican Mafia, not by the individual defendants. App., *post*, A-38 to A-39, n.11. However, the trial court also found that the murder was committed at the behest of the Mexican Mafia. *Id.* at A-6 to A-8. The defendants were in effect agents of the Mexican Mafia who sought good favor by allegedly committing the murder. As agents of the mafia, they were also agents of each other in both the conspiracy to murder Uribe and the subsequent threats and stabbing of the witnesses. *See* 5 J. WEINSTEIN & M. BERGER,

WEINSTEIN'S FEDERAL EVIDENCE 801-73, n.2 (McLaughlin) (1997); Davenport, *Comment: The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 HARV. L. REV. 1378, 1384 (1972).

Although complete waiver of confrontation rights was not addressed to the trial court, the balancing test that the trial court applied contains the concept of waiver. The extent of the permissible burden to be placed on the defense is governed by the extent of the danger posed to the witnesses by the defendants and/or their associates. The confrontation right has been subject to an implicit finding of waiver where a defendant is voluntarily absent from trial. *Taylor v. United States*, 414 U.S. 17, 19 (1973). Implicit waiver has also been found where a defendant is removed from the courtroom entirely for conduct which disrupts the proceedings. *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970). Cases that discuss the evidence necessary for a complete waiver of confrontation rights are instructive concerning the partial waiver inherent in balancing the danger to witnesses against the burden on the defense.

In *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), the defendant was charged along with others in a conspiracy to import over 20 tons of marijuana. The only link to Mastrangelo was that he supplied trucks used in the conspiracy. The only proof that Mastrangelo supplied the trucks was the grand jury testimony of one witness. On his way to the courthouse, that witness was chased down and shot dead in the street. In a tape-recorded conversation made prior to the killing, Mastrangelo made statements to the witness "which, viewed in print, might reasonably be interpreted as threats intended to deter Bennett [the witness] from identifying Mastrangelo as the purchaser of the trucks." *Id.* at p. 271 (footnote omitted). In *Mastrangelo*, the court of appeals held that proof of "[b]are knowledge of a plot to kill [a witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver" of the confrontation right. The standard of proof applied in *Mastrangelo* was by a preponderance of the evidence. *Id.* at pp. 273-274.

Alvarado meets the *Mastrangelo* test for waiver. Witness 1 testified that Alvarado personally threatened him in the county jail

the day before Witness 1 testified before the grand jury. After the killing in this case, a witness was stabbed in jail by a member of the Mexican Mafia who told him not to testify. While in a holding cell, one of the witnesses found graffiti on the wall stating that he would be killed. Since the killing, the stabbing, and the warnings were all at the behest of the Mexican Mafia, sufficient knowledge of a plot to harm these witnesses can circumstantially be imputed to the defendants, as co-conspirators, to support a partial waiver of confrontation rights; i.e., the witnesses would testify before the defendants but the defendants would not learn the true names of these witnesses.

The California Supreme Court upheld the finding of the trial court that the witnesses are in extreme danger from the Mexican Mafia. The trial court's lengthy ruling demonstrates that the evidence presented to the trial court supports the exercise of the court's discretion in preventing the defendants from learning these witnesses' names pre-trial, during trial and beyond trial.

In *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), a witness, Tindall, refused to testify at trial because he feared Carlson. There was no direct evidence that Carlson had threatened him, but Tindall told government agents that if he refused to testify at trial he might have a chance to live. After listening to the government agents' testimony, which the court described as "highly suggestive of threats and intimidating overtures directed at Tindall [the witness] by Carlson" (*id.* at p. 1353), the district court found that the witness was unavailable, and that Carlson had waived his confrontation right such that the grand jury testimony of Tindall would be admitted. *Id.* at pp. 1353-1359. *Accord United States v. Thai*, 29 F.3d 785, 814-815 (2d Cir. 1994), [witness's unsworn statements to police officer admissible at trial where government proved defendant responsible for murder of the witness].)

In *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982), the court of appeal stated: "We conclude that a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation. . . . The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him." *Id.*

at p. 630 [clear and convincing proof required].

By analogy to these federal cases, if proof of knowledge of a plot to kill a witness is sufficient to waive the right of confrontation such that grand jury transcripts can be admitted, *United States v. Carlson*, 547 F.2d at 1356, then allowing these three witnesses to testify using an alias where defense counsel will be able to cross-examine these witnesses in the presence of their clients after having received all of the discovery ordered by the trial court, meets the totality of the circumstances test enunciated in *Smith v. Illinois*, as discussed in *Siegfriedt v. Fair*, 982 F.2d 14.

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CONCLUSION

The California Supreme Court erred in its application of the confrontation clause of the Sixth Amendment as incorporated under the due process clause of the Fourteenth Amendment of the United States Constitution in a manner that places these witnesses at risk of murder at the hands of the Mexican Mafia. The danger necessary to preclude disclosure of the names of witnesses is an issue first impression for this Court. The California Supreme Court decision is also in conflict with decisions of Federal Courts of Appeal. This Court should grant certiorari to review the important constitutional question presented in this case.

Respectfully submitted,

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APPENDIX

Filed 8/17/00

IN THE SUPREME COURT OF CALIFORNIA

JOAQUIN ALVARADO,	)S059827
Petitioner,	)Ct. App. 2/1 No.
v.	)Los Angeles County
THE SUPERIOR COURT	)
OF LOS ANGELES COUNTY,	)Super. Ct. No.
Respondent;	)BA099774
THE PEOPLE,	)
Real Party in Interest.	)
_____	)
JORGE LOPEZ,	)S059827
Petitioner,	)Ct. App. 2/1 No.
v.	)Los Angeles County
THE SUPERIOR COURT OF	)
LOS ANGELES COUNTY,	)Super Ct.
	)No. BA099774
Respondent;	)
THE PEOPLE,	)
Real Party in Interest.	)
_____	)

In this case we must determine the validity of an order, entered prior to trial in a criminal action, that authorizes the prosecution to refuse to disclose to the defendants or their counsel, both prior to ***and at trial***, the identities of the crucial witnesses whom the prosecution proposes to call at trial, on the ground that disclosure of the identities of the witnesses is likely to pose a significant danger to their safety.

Protecting the safety of witnesses unquestionably is of the utmost importance, and a trial court has broad discretion to deny, restrict, or defer disclosure of a witness's identity prior

to trial in order to provide such protection (Pen. Code, § 1054.7). As we shall explain, however, we conclude in light of controlling constitutional authorities that the trial court and the Court of Appeal erred in determining that, when the risk to a witness is sufficiently grave, the identity of the witness may be *permanently* withheld from a defendant and the witness may testify *anonymously at trial* ___ even when the witness is a crucial prosecution witness and withholding the witness's identity will impair significantly the defendant's ability to investigate and cross-examine the witness.

As discussed hereafter, numerous decisions of both the United States Supreme Court and the California courts establish that whenever nondisclosure of a witness's identity will prevent the effective investigation and cross-examination of a crucial witness, the confrontation clause precludes the prosecution from relying upon the witness's testimony at trial while refusing to disclose the witness's identity. As the United States Supreme Court has explained: "[W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness'[s] name and address open countless avenues of in-court examination and out-of-court investigation. *To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.*" (*Smith v. Illinois* (1968) 390 U.S. 129, 131, italics added.)

Accordingly, we conclude that the challenged order must be vacated insofar as it authorizes, in advance of trial and without regard to the evidence and circumstances as they then may appear, the prosecution *permanently* to withhold the identity of these prosecution witnesses from the defense. At the same time, however, we emphasize that the trial court remains free to fashion a more limited order denying, restricting, or deferring disclosure of the identity of each witness *before* trial (including limiting

disclosure to defendants' counsel), as long as that order does not impermissibly impair defendants' right to confront and cross-examine the witnesses effectively *at trial*.

I

On February 6, 1993, during the noon hour, Jose Uribe, an inmate at the Los Angeles County jail, was killed in his cell, having been stabbed 37 times with a contraband knife described as a shank. Three other inmates allegedly witnessed the incident.

Following an investigation by law enforcement officials, a complaint was filed charging defendants Joaquin Alvarado and Jorge Lopez with the first degree murder of Uribe. A third defendant, Frank Marquez, also was charged but is not a party to this proceeding. The prosecution provided discovery to the defense indicating that three inmates witnessed the killing. A magistrate ordered the prosecution to provide the defense with the identities of the witnesses prior to the commencement of the preliminary hearing, pursuant to Penal Code sections 1054.1, subdivision (a), and 1054.5.[1]

Instead of complying with the magistrate's order, the prosecution presented its case to a grand jury, which returned an indictment charging defendant Alvarado with murder (and alleging a prior-murder special circumstance) and conspiracy to commit murder, and charging defendant Lopez with murder, conspiracy to commit murder, and possession of a shank while in custody (on three occasions unrelated to the present incident). (§§ 187, 190.2, subd. (a)(2),182, subd. (a)(1), 4574, subd. (a).)

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1. Unless otherwise specified, all further statutory references are to the Penal Code.

The prosecution is seeking the death penalty against Alvarado but not against Lopez.

The prosecution provided defendants with transcripts of the grand jury proceedings, in which the three inmate eyewitnesses are identified only as witnesses 1, 2, and 3. We summarize the testimony of the three witnesses before the grand jury.

Witness 1 testified that on the day of the murder, he was housed in cell number 12. Witness 1 heard Marquez, a jail trusty, ask one of witness 1's two cellmates in Spanish for some extra jail clothing, mentioning something about a snitch. Witness 1 gave Marquez his shirt, hoping to curry favor with Hispanic inmates. Witness 1 remained in his cell during the noon hour because he was tired. He saw a group of five inmates, including defendants, near his cell. He then heard an altercation and observed the same group of five inmates leave the area.

Two days after the murder, during the course of the sheriff's department's investigation, witness 1 identified a photograph of Marquez as depicting the person to whom he gave his shirt, but six months later he selected another photograph identifying a different individual. Witness 1 told the grand jury that he had been confused regarding his earlier photographic identification. Witness 1 further testified that defendants were in the group of inmates he saw near his cell and that on the day immediately preceding his testimony before the grand jury, he was placed in the same jail cell as defendant Alvarado, who threatened to harm him if he testified.

Witness 2 testified that, on the morning of Uribe's death, Marquez came to cell No. 11, where witness 2 was housed. Marquez spoke to witness 2's cellmates in Spanish. Witness 2 believed that Marquez said a snitch was going to be dealt with in cell No. 10, and said witness 2 should stay away from cell No. 10.

Approximately 10 minutes later, witness 2 heard a Black trusty inform certain Black inmates to stay away from the end of the row where cell No. 10 was located. Witness 2 remained in his cell around noon instead of going to lunch, because he wanted to eat the food he had purchased that morning at the commissary.

Around noon, witness 2 saw defendants Alvarado and Lopez, who were not assigned to cell No. 10, enter that cell with another inmate who was housed there. Witness 2 then heard an altercation inside cell No. 10 and something being said about being a snitch. Shortly thereafter, witness 2 saw Lopez give a bloody shirt to Marquez outside cell No. 10. Witness 2 also saw a bloody body lying under a bed inside cell No. 10. Marquez told witness 2 to return to his cell because the matter did not involve him.

As part of the investigation into Uribe's murder, witness 2 was shown photographs of inmates who had been in the area. Witness 2 identified Marquez, Lopez, and Alvarado. (Witness 2 initially identified a different individual as having accompanied Lopez into cell No. 10. When thereafter shown Alvarado's photograph, witness 2 stated that his earlier identification had been mistaken.)

Witness 3 was a jail trusty assigned to sweep the module that contained cell Nos. 10, 11, and 12. On the morning of the murder, he saw Marquez wrap a shank inside a shirt and give it to another Hispanic inmate. After lunch, witness 3 saw Marquez take a shirt from someone on the same row.

The prosecution provided the defense with the grand jury transcripts and information regarding the witnesses' criminal histories, but did not provide the names or photographs of witnesses 1, 2, or 3. The defense continued to seek the witnesses' true names and addresses. The prosecution then

sought a protective order, authorizing it *permanently* to withhold disclosure of the witnesses' identities and photographs from defendants or their counsel on the ground that disclosure would place the witnesses' lives in danger.

Over defendants' objections, the trial court held a series of in camera hearings, *from which the defense was excluded*, to permit the prosecution to demonstrate good cause why disclosure of the witnesses' names and photographs should be denied. (§ 1054.7.) Based upon the evidence adduced at these hearings, the trial court found as follows:

"The evidence presented clearly established that witnesses 1 through 3 are in serious danger as a result of their participation in this case and that the disclosure of their names would likely increase the danger to them. Several facts support this conclusion, including the following:

"(1) The homicide is believed to have been ordered by the Mexican Mafia, a notorious prison gang, and that the defendants, who are not members of the gang, committed the homicide to gain favor with the Mexican Mafia.

"(2) The Mexican Mafia is well-known for retaliatory acts against . . . informants and government witnesses, including murder. [¶] Information disclosed in camera documented 12 incidents of murder or attempted murder at the county jail of inmates between 1988 through 1991 which were committed by or at the direction of the Mexican Mafia. The additional five murders linked to the Mexican Mafia during this period of time were committed on persons who were not incarcerated. [¶] The Mexican Mafia is believed to have ordered the murders of witnesses in protective custody and incarcerated in other states . . . .

"(3) The Mexican Mafia has an excellent intelligence network which includes sources in several public agencies and is able to obtain confidential information. [¶] . . . [¶] Penetration [by] the Mexican Mafia of penal institutions is so extensive that one in camera witness described the organization as having 'de facto control' over all penal institutions in California.

"(4) . . . [T]he danger the Mexican Mafia poses to government witnesses is extreme. In camera, a witness stated that the Mexican Mafia has ordered so many hits and there are so many witnesses in protective custody that we cannot adequately protect them all.

"(5) The Mexican Mafia requires documentation which identifies an individual as a government witness before a contract to kill the witness is approved. The procedure for issuing contracts was described as follows: [¶] For contracts to be issued, one Mexican Mafia member alone cannot give the contract. He has to have that contract approved. [¶] The contract is approved in a manner where they meet, two or three members meet. They are presented with evidence. They have . . . what you would call a trial. It is informal. This evidence includes transcripts or paperwork . . . that would indict this person who has been a witness and that is why the name is so important.

"(6) A witness in the instant case was attacked and cut in jail after the killing in this case. The attacker was a member of the prison gang aligned with the Mexican Mafia and warned the witness not to testify. [¶] One of the defendants in this case threatened a witness while the witness was in protective custody and told the witness somebody would get him. [¶] Someone wrote on a wall while a witness was in a court holding cell that the witness was dead. And that the witness was a snitch at the time when the witness was in protective custody.

"(7) In the instant case, the homicide was committed in a manner which suggests highly organized criminal activity involving several persons. [¶] The victim arrived at the institution a single day or at most two days before the killing. This fact suggests that the group responsible for his killing had intelligence and organization. It was known that the [victim] was coming, where he would be and how to get to him. [¶] This sophisticated criminal activity involving the obtaining of shanks which, of course, [are] illegal to possess in the jail, getting the shanks to the floor [where] they could be used, obtaining the extra clothing so the killer could rid themselves [*sic*] of the blood-stained clothes, getting rid of the blood-stained clothes. [¶] The sophistication of the killing indicates no one is safe inside the county jail system and I think that also obtains to persons who are in prison within California and in prisons outside of California.

"Based on the foregoing and the other facts disclosed to the court in camera, it is clear that the witnesses 1 through 3 are in danger and that disclosure of their names would increase the risk of possible danger to them with a resulting possible los[s] of evidence; that is, their testimony, which has not been preserved in any usable way. [¶] So I find good cause has been shown to support that there is a danger to these witnesses.

"But I must say I continue to be troubled by the People's request to not turn over the names. It is a difficult issue for me. And even though I think good cause exists, I certainly am persuaded by [counsel for defendant Alvarado] Mr. Crain's argument and the arguments of counsel that for them to investigate the case in this situation, it makes it almost impossible to investigate without the names. . . ."

Based upon the foregoing findings, the trial court concluded that good cause for nondisclosure of the witnesses' true names had been established. The court therefore issued the

following minute order: "[The] People's request to withhold the names of witnesses from the defense is granted. The witnesses will be made available for interview by defense counsel 30 (thirty) days before trial. The witnesses are not required to state their names, but, may do so at their own volition."

Defendants thereafter sought writ review of the trial court's order. The Court of Appeal denied defendants' petitions for writ of mandate. Defendants thereafter sought review from this court. We granted review and transferred the matters to the Court of Appeal, with directions to that court to vacate its order denying mandate and to issue an alternative writ to be heard before that court. The Court of Appeal, upon discovering a discrepancy between the trial court's minute order and the reporter's transcript, remanded the case to the trial court, which issued a new minute order clarifying its ruling and providing as follows: (1) the prosecution is authorized *permanently* to withhold from the defense the identities of the three witnesses; (2) the prosecution is to produce the witnesses for interview by defense counsel 30 days prior to trial, although the witnesses are not required to speak to defense counsel, and if they do, they may ___but are not required to ___ disclose their names; (3) if defense counsel learn the witnesses' names, they may not disclose the names to defendants; and (4) at trial, the witnesses may ___ but are not required to ___ disclose their names, but their appearance will not be disguised.

Both of the defendants thereafter sought further writ review from the Court of Appeal, which consolidated the two petitions, issued an order to show cause, and ultimately resolved the matter in a written opinion rendered by a divided court.

In its opinion, the majority of the Court of Appeal determined that the trial court properly had exercised its discretion in authorizing the prosecution permanently to withhold the

witnesses' identities from the defense, based upon the trial court's finding that disclosure of the witnesses' names "would place them in mortal danger. . . ." In so holding, the majority acknowledged that under the trial court's order "[d]efendants will have difficulty obtaining complete information about the witnesses' location and ability to observe and testify about the crime. Moreover, defendants will be unable to obtain complete impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own charges." In sum, the majority conceded that the trial court's nondisclosure order would seriously limit defendants' effective investigation and cross-examination of the witnesses, "significantly impair[ing]" defendants' constitutional rights to confrontation and to due process of law. Nonetheless, the majority concluded that in light of the potentially grave danger to the witnesses, the impairment of defendants' ability to cross-examine and impeach the witnesses was not unconstitutional. In reaching this conclusion, the Court of Appeal majority expressly disagreed with the conclusion reached in *People v. Brandow* (1970) 12 Cal.App.3d 749, in which the appellate court held that disclosure of the identity of a witness constitutes "an essential element in the protection of the defendant's right to a fair trial." (12 Cal.App.3d at p. 755.)

The dissenting justice in the Court of Appeal challenged the majority's analysis of the relevant case law and criticized the majority for according undue weight to the threat of retaliation against the prosecution's witnesses at the expense of the defendants' constitutional rights. Questioning the ultimate effectiveness of the trial court's nondisclosure order, the dissent observed that "in addition to trying to dissuade adverse witnesses from testifying, it is also part of the Mexican Mafia's arsenal to retaliate against such witnesses once their testimony has been

given. Here, although the likelihood that the People will be able to bring this case to trial may be enhanced by the order of nondisclosure, once the witnesses have appeared in open court and thereby been subjected to the scrutiny of the Mexican Mafia's extensive intelligence network, what protection the nondisclosure order previously afforded could well be rendered meaningless."

We again granted defendants' petitions for review, on this occasion in order for us to determine whether the trial court's order, by permitting the prosecution's crucial witnesses to testify anonymously at trial, violates defendants' constitutional rights to due process of law and to confront the witnesses against them.

II

Proposition 115, approved by the voters in June 1990, included provisions amending the California Constitution and the Penal Code in numerous respects, one of which explicitly authorizes reciprocal discovery in criminal cases. (Cal. Const., art I, § 30, subd. (c); Pen. Code § 1054 et seq.; *People v. Tillis* (1998) 18 Cal.4th 284, 289.)[2] Among the statutory revisions implementing the pretrial discovery provisions of the initiative was the addition of sections 1054 through 1054.8, setting forth pretrial discovery procedures to be followed in criminal cases. Included within these procedures is the requirement that a

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2. We upheld the constitutionality of the reciprocal discovery provisions of Proposition 115 in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356. (See also *In re Littlefield* (1993) 5 Cal.4th 122 [holding that the applicable discovery statutes authorize an order requiring defense counsel to acquire and disclose to the prosecution the address, if reasonably accessible, of a person whom the defense intends to call as a witness, and also authorize a contempt sanction for refusal to obey such an order].)

prosecutor disclose the names and addresses of the individuals whom he or she intends to call at trial. (§ 1054.1, subd. (a).) The disclosure may be made to defense counsel, who is prohibited from revealing, to the defendant or others, information that identifies the address or telephone number of the prosecution's potential witnesses, absent permission by the court after a hearing and a showing of good cause. (§ 1054.2.) Before a party may seek court enforcement of any disclosure required by the pretrial discovery statutes, the party must make an informal request for the desired materials and information; if disclosure is not made within 15 days of the request, the party may seek a court order requiring disclosure, and a court may enter any order necessary to enforce the statutory provisions, including an order directing immediate disclosure. (§ 1054.5.) Absent a formal court order directing earlier disclosure, discovery must be provided at least 30 days prior to trial, "unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7.) "Good cause" is defined for purposes of this provision as "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigation by law enforcement." (*Ibid.*) Section 1054.7 additionally provides that upon the request of any party, the court may permit a showing of good cause ___ for the denial or regulation of disclosures ___ to be made in camera.[3]

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3. Section 1054.1 provides in pertinent part: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following . . . information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call at trial. . . ."

Section 1054.2 provides: "(a)(1) Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed

(continued...)

3. (...continued)
to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause.

"(2) Notwithstanding paragraph (1), an attorney may disclose or permit to be disclosed the address or telephone number of a victim or witness to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by an attorney shall be informed by the attorney that further dissemination of the information, except as provided by this section, is prohibited.

"(3) Willful violation of this subdivision by an attorney, persons employed by the attorney, or persons appointed by the court is a misdemeanor."

Section 1054.5 provides in pertinent part: "(a) No order requiring discovery shall be made in criminal cases except as provided in this chapter. . . . [¶] (b) Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired material and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. . . ."

Section 1054.7 provides in pertinent part: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure

(continued...)

As noted, on the basis of the evidence presented by the prosecution at the in camera hearing in this case, the trial court found that good cause existed to permit the prosecution to withhold the identities of the witnesses because disclosure was likely to pose a serious danger to their safety. The court ruled that the prosecution was required only to make the witnesses available for interviews by the defense 30 days prior to trial, and that the witnesses need not disclose their names or even submit to the interviews. On remand from the Court of Appeal, the trial court subsequently clarified its order, reiterating that the prosecution must make the witnesses available for interviews by the defense, but further specifying that the witnesses' identities need not be disclosed to the defense unless the witnesses themselves choose to reveal their identities (in which case the attorneys would be precluded from disclosing the witnesses' identities to their clients). The trial court further clarified that its intent was to authorize the prosecution to withhold the witnesses' identities (and their photographs) from defendants and their counsel both at the pretrial discovery stage ***and at trial***. The trial court further ordered that the witnesses need not submit to interviews by the defense.

Defendants do not contend that the trial court's finding that disclosure of the witnesses' names and photographs would pose a potential danger to the safety of the witnesses does not constitute "good cause" within the meaning of section

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3. (...continued)
should be denied, restricted, or deferred. . . . 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [¶] Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera."

1054.7, but they maintain that, under the circumstances of the present case, the trial court's order ___ upholding the prosecution's authority to withhold disclosure of the witnesses' identities at trial ___ violates their rights, as guaranteed by the United States Constitution, to due process of law and to confront the witnesses against them. The resolution of this case turns upon these federal constitutional issues.[4]

III

In analyzing defendants' federal constitutional claims, it is helpful to discuss separately two aspects of the trial court order before us: (1) the validity of that order insofar as it permits the prosecution to decline to disclose the witnesses' identities to the defense before trial, and (2) the validity of the trial court's order insofar as it permits the prosecution to continue to withhold the witnesses' identities at trial.

With regard to the first issue ___ i.e., disclosure of the witnesses' identities before trial ___ Penal Code section 1054.7 establishes that a trial court has discretion to deny, restrict, or defer disclosure for good cause. Good cause, as defined in the statute, expressly includes "threats or possible danger to the safety of a victim or witness." (*Ibid.*) Petitioners have cited no authority that suggests that the statute, in this respect, is unconstitutional under either the confrontation clause or the due process clause. (See generally *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 (plur. opn. of Rehnquist, C.J.) ["the right to confrontation is a trial right"]; *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 ["It does not follow from the prohibition against

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4. Defendants have not raised any claim under the California Constitution, and therefore we need not and do not address any state constitutional issue.

concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* [*v. Maryland* (1963) 373 U.S. 83] did not create one . . . ."]; *Wardius v. Oregon* (1973) 412 U.S. 470, 474 ["[Although] the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded [citation], it does speak to the balance of forces between the accused and his accuser."]; *People v. Hammon* (1997) 15 Cal.4th 1117, 1124-1128 ["we decline to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information"]; cf. 4 LaFave et al., Criminal Procedure (2d ed. 1999) § 20.3 (m), pp. 583-584 & fn. 231 [citing several cases in which "state courts have occasionally found due process violated where the prosecution's failure to disclose certain critical portions of its evidence before trial deprived the defendant of an adequate opportunity to prepare to meet the prosecution's case"].) Like California, other states that generally authorize pretrial discovery of the identities of witnesses whom the prosecution intends to call at trial provide at the same time for an exception in instances in which disclosure may pose a danger to a witness's safety (see 4 LaFave et al., *supra*, § 20.3 (h), pp. 869-870 & fns. 150-153), and we are unaware of any case that suggests that the denial of pretrial disclosure in such circumstances is constitutionally impermissible.

Even before Proposition 115 added section 1054.7 to the Penal Code, this court had recognized that a trial court retains considerable discretion to protect a witness's identity before trial. In *People v. Lopez* (1963) 60 Cal.2d 223, the defendants sought disclosure of the names and addresses of certain prospective prosecution witnesses during the pretrial stage of the proceeding. The prosecution opposed immediate disclosure on the ground that the witnesses "were in 'fear of physical injury or death' " (60 Cal.2d at p. 245), and after conducting a hearing on

the issue, the court denied the defendants' request for immediate disclosure of the witnesses' identities but ordered the prosecution to provide the information to the defense shortly before the witnesses were to be called to testify at trial.

On appeal of their subsequent convictions, the defendants contended that the trial court committed prejudicial error in denying their motion for immediate disclosure of the identities of the prospective witnesses prior to trial. In *Lopez*, this court rejected the contention, explaining that "*in special circumstances* [the state may] have cogent reasons for keeping confidential ___ in order to give some assurance that the truth can be presented ___ the names of prospective witnesses. There must be a balancing of the right of a defendant to discover potentially material witnesses with the probability that such discovery might lead to the elimination of an adverse witness or the influencing of his testimony. In balancing these competing factors the trial court must be allowed great discretion. [Citation.] . . . [¶] The court's order delaying disclosure was, undoubtedly, a conscientious effort on the part of the court to balance the claimed right of defendants to immediate disclosure with realistic danger inherent in such disclosure. It is the *timeliness* rather than the *immediacy* of disclosure which should control. In view of the facts before the court, we cannot say that the court abused its discretion by ordering disclosure delayed until shortly before the subject witnesses were to be called." (*People v. Lopez, supra,* 60 Cal.2d at pp. 246-247, italics in the original.)

In the case before us, the evidence presented to the trial court clearly justified its order protecting the witnesses' identities before trial. In view of the circumstances of the offense ___ a jailhouse murder with likely prison gang involvement and crucial prosecution witnesses who themselves were jailhouse inmates and thus particularly vulnerable to threats, coercion, or violent acts of other inmates, the trial court clearly had discretion

to permit the prosecution to withhold pretrial disclosure of the witnesses' names and photographs. Particularly in a capital case, where pretrial preparation and investigation often extend over a considerable period of time, early disclosure of the identity of a vulnerable and threatened witness greatly may increase the danger of "the elimination of an adverse witness or the influencing of his testimony." (*People v. Lopez*, *supra*, 60 Cal.2d at p. 247.)

Accordingly, we conclude the challenged order clearly is valid insofar as it authorizes the prosecution to refrain from immediately disclosing the inmate witnesses' identities to the defense.

IV

As noted, however, the trial court's order in this case ___ particularly as clarified after remand ___ did not simply authorize the prosecution to deny the disclosure of the witnesses' identities before trial, but rather went further and ruled that the prosecution *permanently* could withhold the witnesses' identities from the defense, even during (and after) their testimony at trial. Although the Court of Appeal recognized that this aspect of the order would, as a practical matter, seriously impair defendants' ability to investigate the witnesses' backgrounds and credibility (as the trial court also recognized) and would affect adversely their constitutional right of cross-examination, the Court of Appeal majority ultimately concluded that, because of the seriousness of the danger faced by the witnesses, even the complete withholding of this information from the defense at trial does not violate defendants' constitutional rights.

As the Court of Appeal also recognized, the aspect of the trial court's order authorizing the prosecution to withhold permanently from the defense the names of witnesses who are to testify at trial directly implicates defendants' rights under the

confrontation clause of the federal Constitution. Thus, in analyzing the validity of the Court of Appeal's decision nonetheless to uphold the trial court's order permitting nondisclosure at trial, we examine the governing authorities under the federal confrontation clause.[5]

A

The Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) "The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings (*Pointer v. Texas* (1965) 380 U.S. 400), 'means more than being allowed to confront the witness physically.' (*Davis v. Alaska*, *supra*, 415 U.S. at p. 315.) Indeed, ' "[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*." ' (*Id.*, at pp. 315-316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 678.) "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this

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5. Unlike the order in *People v. Hammon*, *supra*, 15 Cal.4th 1117, which involved only the question of *pretrial* disclosure of information, the trial court order here at issue explicitly authorizes nondisclosure of the witnesses' identities even during (and after) their testimony at trial. As the court in *Hammon* made clear, our decision in that case did not purport "to address the application *at trial* of the [confrontation clause] principles articulated in *Davis* [*v. Alaska* (1974)] 415 U.S. 308." (*Hammon*, *supra*, 15 Cal.4th at p. 1128.) The People acknowledge that insofar as the trial court's order authorizes the witnesses to testify anonymously at trial, the order implicates defendants' right of confrontation under the federal Constitution.

country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.)[6]

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6. Confrontation and cross-examination "have ancient roots" (*Greene v. McElroy* (1959) 360 U.S. 474, 496-497), "with a lineage that traces back to the beginnings of Western legal culture." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1015.) The right of a defendant to know his or her accusers and to mount a defense against them can be traced back to the time of the Roman Empire and the sedition trial of the Apostle Paul in the year 60 A.D. (*Ibid.*; see also Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model* (1992) 76 Minn. L.Rev. 557, 569 (Berger); Ishola, *Of Confrontation: The Right Not to Be Convicted on the Hearsay Declarations of an Accomplice*, 1990 Utah L. Rev. 855, 859.)

This ancient right of confrontation took an intriguing evolutionary turn in medieval England. Beginning around the year 1290, a group of officials appointed by the King of England "began regularly to advise the king on the resolution of legal disputes which were of interest to the Crown. The Privy Council, as the group came to be called, also performed several other executive functions. By the mid-fourteenth century, when the Privy Council acted as a court, it sat in a room at Westminster ornamented with the king's star-shaped seal. The Council-as-tribunal came to be known as the Star Chamber." (*United States v. Gecas* (11th Cir. 1997) 120 F.3d 1419, 1446, fn. omitted (*Gecas*).)

The Star Chamber helped to maintain the Crown's control over its enemies by adopting an inquisitorial system of criminal procedure ___ forgoing the use of juries, dispensing with established criminal procedure, and relying upon unidentified accusers. (Berger, *supra*, 76 Minn.L.Rev. 557; see also *In re Oliver* (1948) 333 U.S. 257, 271, fn. 22 ["[T]he accused himself was grilled in secret, often tortured, in an effort to obtain a

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confession . . . ."]; *United States v. Cojab* (2d Cir. 1993) 996 F.2d 1404, 1407 ["A defendant's trial was based on charges made by persons whose identities were not disclosed, and he could be examined under torture, with the ultimate decision left to a court sitting without a jury."]; New Encyclopedia Britannica (15th ed. 1990) p. 218.) The Puritan nonconformists of the early 17th century protested against the Crown's reliance upon inquisitorial tactics, departing England for Plymouth Colony in 1620 "partly because of the repressive techniques of the . . . Star Chamber." (*Gecas*, *supra*, 120 F.3d 1419, 1449.)

The excesses of the Star Chamber ultimately led to it elimination. "A resolution of Parliament condemned the Star Chamber's methods as 'illegal' and 'tyrannical,' thus giving the right to confront [one's] accusers a strong endorsement." (Note, *Eighth Circuit Applies the Confrontation Clause at a Sentencing Hearing* – United States *v.* Fortier, *911 F.2d 100 (8th Cir. 1990)* (1991) 17 Wm. Mitchell L. Rev. 829, 832, fns. omitted.) The Star Chamber was abolished in 1641. (*In re Oliver*, *supra*, 333 U.S. 257, 266; see also *Faretta v. California* (1975) 422 U.S. 806, 821, fn. omitted [the Star Chamber was a "curious institution . . . [that] has for centuries symbolized disregard of basic human rights"]; *Pate v. State* (Okla.Crim.App. 1967) 429 P.2d 542, 545 [tracing the rise and fall of the Star Chamber].)

The colonists who emigrated from England to North America in the 17th and 18th centuries brought with them a belief in the right of confrontation. Thus, guarantees of confrontation were included within the colonial constitutions of Massachusetts, New Hampshire, North Carolina, Maryland, and Virginia, and "it appears to have been assumed that a confrontation provision would be included in the Bill of Rights that was to be added to the Constitution after ratification." (*California v. Green* (1970) 399 U.S. 149, 175, fn. 6 (conc. opn. of Harlan, J.).) The primary purpose of the confrontation clause ultimately set forth in the Sixth Amendment was to prevent the abuses that had occurred in

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"[T]he right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding. . . ." (*Pointer v. Texas*, *supra*, 380 U.S. 400, 407-408.) The right of confrontation is not absolute, however (*Maryland v. Craig* (1990) 497 U.S. 836, 849; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *In re Elizabeth T.* (1992) 9 Cal.App.4th 636, 640), "and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." (*Chambers v. Mississippi, supra*, 410 U.S. at p. 295.) In order to consider how these fundamental principles should be applied in the present case, we examine the relevant case law, set forth below.

In *Alford v. United States* (1931) 282 U.S. 687 (*Alford*), the defendant was convicted of using the mails to

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England. (*Mattox v. United States* (1895) 156 U.S. 237, 242-243; see also *California v. Green*, *supra*, 399 U.S. at p. 156; Heller, The Sixth Amendment to the United States Constitution: A Study in Constitutional Development (1969) p. 104.)

Although the historical ***underpinnings*** of the confrontation clause are reasonably clear, the intended ***reach*** of the clause has been viewed as enigmatic. (See Berger, ***supra***, 76 Minn.L.Rev. at p. 562 ["Little information exists about precisely what the concept of confrontation signified in the seventeenth and eighteenth centuries in England and the colonies."].) "[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause. . . ." (*California v. Green, supra,* 399 U.S. 149, 173-174 (conc. opn. of Harlan, J.).) "From the scant information available it may tentatively be concluded that ***the Confrontation Clause was meant to constitutionalize a barrier against*** flagrant abuses, ***trials by anonymous accusers***, and absentee witnesses." (*Id.*, at p. 179 (conc. opn. of Harlan, J.), italics added.)

defraud, based upon damaging testimony given on direct examination by a former employee of the defendant. On cross-examination, when the defense sought to elicit the witness's place of residence, the prosecution objected on the ground that such information was immaterial. Defense counsel insisted that the questions were proper, the jury being entitled to know " 'who the witness is, where he lives and what his business is.' " The trial court rejected defense counsel's arguments, and sustained the objection. The court of appeals affirmed.

In reversing the judgment on the ground that the trial court's curtailment of the cross-examination of the prosecution witness was an abuse of discretion and constituted prejudicial error, the United States Supreme Court held that "[c]ross-examination of a witness is a matter of right. [Citation.] Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood . . . . [¶] It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations.] . . . [¶] The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. [Citations.]" (*Alford, supra,* 282 U.S. 687, 691-693; see also *Roviaro v. United States* (1957) 353 U.S. 53, 60-61 [holding that where the disclosure of an informant's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the government's privilege to withhold

from disclosure the informant's identity "must give way"].)

In *Smith v. Illinois*, *supra*, 390 U.S. 129 (*Smith*), the defendant was convicted of the illegal sale of narcotics, following a trial in which the prosecution's principal witness testified that he had purchased heroin from the defendant in a restaurant. On cross-examination, the witness was asked whether the name by which he had identified himself on direct examination was his correct name. He admitted, over the prosecutor's objection, that it was not. The witness was then asked to state his correct name. The trial court sustained the prosecutor's objection to the question. The witness subsequently was asked where he lived, and again the court sustained the prosecutor's objection.

In reversing the judgment because of federal constitutional error, the United States Supreme Court observed that there had *not been a complete denial* of the defendant's right of cross-examination. "But the [defendant] was denied the right to ask the principal prosecution witness either his name or where lived, although the witness admitted that the name he had first given was false. *Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness'[s] name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.*" (*Smith, supra,* 390 U.S. 129, 131, italics added, fn. omitted.) Accordingly, the high court held in *Smith* that the trial court's ruling violated the defendant's constitutional right of confrontation.[7]

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7. Neither *Alford*, *supra*, 282 U.S. 687, nor *Smith*, *supra*, 390 U.S. 129, addressed the question whether nondisclosure of a

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B

In 1970, two years after the United States Supreme Court handed down its decision in ***Smith***, ***supra***, 390 U.S. 129, the Court of Appeal decided ***Brandow, supra***, 12 Cal.App.3d 749. As noted, the Court of Appeal in the present case expressly disagreed with ***Brandow***. In ***Brandow***, the defendant was charged with one count of pandering and one count of attempted pandering. The principal witness against him was one Michelle Dupree, the assumed name of a woman who had engaged in prostitution prior to agreeing to cooperate with the police by tape-recording her telephone calls. At trial, the witness testified that Michelle Dupree was not her true name, and the court, after hearing evidence outside the presence of the jury regarding threats to the witness's safety and "physical harm and abuse which had already been inflicted upon her," sustained the prosecutor's objection to a

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witness's identity might be justified by a need to protect the safety of the witness. In a concurring opinion to the court's decision in *Smith*, however, Justice White (joined by Justice Marshall) observed: "In *Alford* . . . the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here, the State gave no reasons justifying the refusal to answer a quite usual and proper question [concerning the *address* of a witness]. For this reason, I join the Court's judgment . . . ." (*Smith, supra,* 390 U.S. 129, 133-134 (conc. opn. of White, J.).)

question asked by defense counsel on cross-examination seeking the witness's true identity. (*Brandow, supra,* 12 Cal. App. 3d 749, 754.)

On appeal from his conviction, the defendant in *Brandow* contended that the trial court erred in sustaining the prosecutor's objection, thereby depriving the defendant of his right of confrontation. Citing *Smith*, *supra*, 390 U.S. 129, the court in *Brandow* agreed with the defendant, finding that it was constitutionally impermissible to bar the defendant from ascertaining the witness's actual identity. The court in *Brandow* explained: "Under the circumstances, the credibility of the two opposing witnesses [Dupree and the defendant, himself,] constitutes the fulcrum upon which the determination of the defendant's guilt or innocence must be balanced. We conclude that the identity of the witness was an essential element in the protection of the defendant's right to a fair trial." (*Brandow, supra,* 12 Cal.App.3d 749, 755; accord, *Alford v. Superior Court* (1972) 29 Cal.App.3d 724, 728 [holding that the defendant was entitled to cross-examine a material witness as to his true name]; *People v. Mascarenas* (1971) 21 Cal.App.3d 660, 666 [reversing the trial court's ruling that a material witness need not disclose his address where the trial court found that "the witness is in possible danger of harassment, intimidation, humiliation, if not personal safety"]; cf. *People v. Benjamin* (1975) 52 Cal.App.3d 63, 73-75 [upholding the trial court's order precluding inquiry on cross-examination regarding the home addresses of four prosecution witnesses, in a case involving numerous eyewitnesses and the presence of circumstantial evidence implicating the defendant]; *People v. Patejdl* (1973) 35 Cal.App.3d 936, 940-944 [upholding the trial court's order denying the defendant's motion to discover an informant's address in view of the danger to the witness's personal safety, where there was no substantial conflict between the testimony of the defendant and that of the informant on the issues determinative of guilt].)

C

The People urge us to consider several state and federal judicial decisions that assertedly embrace the proposition that a defendant's right of confrontation properly may be balanced against the need to protect a witness's safety. The People contend that under such a balancing process, when the risk posed to a witness's safety is grave enough, a defendant's right to be informed of the identity of the witness properly may give way even if the witness's testimony is crucial to the prosecution's case. The Court of Appeal majority endorsed this position.

In observing that *Alford*, *supra*, 282 U.S. 687, and *Smith*, *supra*, 390 U.S. 129, do not establish an inflexible rule requiring disclosure of a witness's identity and address in all circumstances, however, the overwhelming majority of the decisions cited by the People and the Court of Appeal ___ unlike the case presently before us ___ involved factual situations in which the ***only*** information withheld from the defense was the residential ***address*** of the witness or other identifying information deemed to be ***inconsequential*** to the defendant's right to a fair trial under the facts presented. (See, e.g., *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 771[where four eyewitnesses to a murder committed during the robbery of a restaurant all were employees of the restaurant, the court upheld nondisclosure of the witnesses' addresses because "the facts raise no issue of their reputation in their community for veracity"]; *People v. Watson* (1983) 146 Cal.App.3d 12, 20 [in permitting nondisclosure of the prosecution witness's address, the court found that the defendant "was not deprived of a substantial right," because he already had presented "ample evidence . . . to place the witness . . . in his proper setting and accurately to evaluate his credibility"]; *People v. Castro* (1979) 99 Cal.App.3d 191, 200-204 [defense sought the address of the prosecution's witness for the purpose of impeachment, but because the witness already had been impeached as a drug addict,

felon, and cheat, the court found that the defense had presented "sufficient environmental background" to allow the jury to judge the witness's credibility].)[8]

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8. Numerous decisions handed down in the federal courts similarly have held that where the identifying information, such as a witness's true name and address, was deemed to be inconsequential to material issues to be contested at trial, nondisclosure was permissible on the basis that the lack of such information did not prejudice the defense. (See, e.g., *United States v. Cavallaro* (2d Cir.1977) 553 F.2d 300, 304 [the government's legitimate concern for the witness's safety justified denying defendant the correct address of a witness, where the defense failed to state why the information was material]; *United States v. Persico* (2d Cir.1970) 425 F.2d 1375, 1383-1384 [fear for the witnesses' personal safety justified the trial court's refusal to disclose their correct address and place of employment, where the witnesses were well known to the defense and the defense failed to demonstrate a "particularized need" for the information]; *United States v. Marti* (2d Cir.1970) 421 F.2d 1263, 1265-1266 [the defendants were not deprived of the rights of confrontation and due process by the court's refusal to order the witness to disclose a residential address, where the prosecutor had offered the address privately to the defense and where the information was not significant to the investigation by the defense or to the witness's testimony at trial]; *United States v. Baker* (2d Cir.1969) 419 F.2d 83, 87 [a witness who had received threats to his life properly refused to disclose his name and the address of his current employer, where the defendant's need to know such information "was inconsequential"]; *United States v. Bennett* (2d Cir.1969) 409 F.2d 888, 901 [no reversible error under *Smith* where the witness was not required to disclose a place of employment, and where the defense had failed to show a particularized need for the information]; *United States v. Jordan* (4th Cir.1972) 466 F.2d 99, 101-102 [upholding nondisclosure of the names of two eyewitnesses to a jailhouse knife attack, where the victim identified

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the defendant and provided testimony that "was itself enough to sustain the conviction even if" the other witnesses had been discredited, and where the testimony of prison guards thoroughly discredited the defendant's alibi]; *United States v. Hughes* (5th Cir.1981) 658 F.2d 317, 321-322 [trial court's ruling prohibiting disclosure of a hostile defense witness's address did not amount to plain error, where "no advantageous purpose" was to be gained by disclosure]; *United States v. Contreras* (5th Cir.1979) 602 F.2d 1237, 1239-1240 [the reasonable concern for a Drug Enforcement Administration agent's safety justified the trial court's refusal to require disclosure of his home address, where the defendant "had ample opportunity to place the witness in his proper setting," and nondisclosure of the agent's home address "could not have prejudiced defendant"]; *United States v. Avalos* (5th Cir.1976) 541 F.2d 1100, 1117 ["observing that the Supreme Court . . . had established no hard and fast rule regarding questions about [current] addresses," and the defendants had failed to show prejudice from the nondisclosure of such information involving two government witnesses who had been placed in a witness protection program]; *United States v. Crockett* (5th Cir.1975) 506 F.2d 759, 762-763 [the government's strong basis for believing that its witnesses' lives were in danger justified the trial court's order permitting nondisclosure of their residential addresses, and defendants demonstrated no prejudice]; *United States v. Alston* (5th Cir.1972) 460 F.2d 48, 50-54 [a federal narcotics agent was not required to disclose his home address where reasonable fear concerning safety of the witness and his family existed, and nondisclosure was not prejudicial]; *United States v. Olson* (7th Cir.1992) 978 F.2d 1472, 1476-1477 [trial court's failure to order disclosure of an informant's address did not deny defendant his rights of due process and confrontation, in view of the circumstance that the defense had ample impeachment evidence and the value of the sought-after information was minimal]; *United States v. Twomey* (7th Cir.1972) 460 F.2d 400, 402-403
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[upholding nondisclosure of the identity of a paid government informant who had a drug habit, in part because the defense already had adduced such impeachment and the witness "was not a principal prosecution witness," and noting that nondisclosure is permissible only "where the informant is not the principal witness against the accused"]; *United States v. Springer* (8th Cir.1987) 831 F.2d 781, 783 [upholding nondisclosure of information related to the location of the informant's upbringing, where the jury was exposed to an extensive amount of evidence regarding the informant's background]; *United States v. Spector* (8th Cir.1986) 793 F.2d 932, 937-938 [informant not required to disclose correct address in open court, where the prosecutor had offered to provide the information privately to defense counsel, and the defendant failed to demonstrate prejudice from nondisclosure]; *United States v. Washington* (9th Cir.1986) 797 F.2d 1461, 1474-1475 [concerns about the personal safety of former prostitutes justified the trial court's refusal to order disclosure of their present addresses, where the evidence established that the defendant had beaten prostitutes with various objects]; *United States v. Rangel* (9th Cir.1976) 534 F.2d 147, 148 [upholding nondisclosure of the identity of a paid government informant in order to maintain the witness's cover, and because the defense did not require the informant's true name in order to uncover facts with which to impeach his testimony effectively]; *United States v. Cosby* (9th Cir.1974) 500 F.2d 405, 407 [upholding nondisclosure of the government informant's address, where tape recordings of the defendant's incriminating conversations with the informant were introduced]; *United States v. Ellis* (9th Cir.1972) 468 F.2d 638, 639 [upholding nondisclosure of the government agent's identity on the basis that "[t]he incriminating transaction was observed by police officers, and the relevance of the personal history of the undercover agent was questionable"]; *United States v. Smaldone* (10th Cir.1973) 484 F.2d 311, 318-319 [the trial court's refusal to allow the defendant to elicit the address of a government

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In other cases relied upon by the People, the identity or address of the witness *actually was made available* to defense counsel privately, or was discovered by the defense prior to trial. Thus, nondisclosure was limited to events occurring in open court and did not preclude defense efforts to investigate the witness for the purpose of obtaining material that might be useful in cross-examination. Therefore, these cases, too, are distinguishable from the case presently before us. (See, e.g., *People v. Ramirez* (1997) 55 Cal.App.4th 47, 55 [in a sexual assault case involving a victim who was allowed to testify under the pseudonym Jane Doe, "the defense was provided with complete discovery, including the true name and address of the victim"]; see also *Siegfriedt v. Fair* (1st Cir.1992) 982 F.2d 14, 17 [no violation of defendant's right of confrontation where the prosecution witness testified under a pseudonym at a probable cause hearing,

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8. (...continued)
informant was not error, where "there was not present the usual necessity to bring out the address" of the witness, and the defendant failed to make a showing as to why he needed such information]; *United States v. Varella* (11th Cir.1982) 692 F.2d 1352, 1355-1356 [upholding nondisclosure of the identity of each of the government informants who had "minimal" participation in the case and whose testimony "overwhelmingly focused on collateral matters"]; see also *United States v. Mesa* (5th Cir.1981) 660 F.2d 1070, 1075-1076 [the defendant's right of confrontation was not violated by the court's failure to conduct an in camera hearing before refusing to order disclosure of the witness's address, where information known to the defense gave defendants "ample opportunity" to identify the witness within his environment]; *United States v. Fife* (6th Cir.1976) 573 F.2d 369, 376-377 [where the prosecution witness declined at trial to reveal his residential address but on cross-examination revealed the name of the small town in which he resided, "the purpose of *Alford* and *Smith*" ("to identify the witness and locate him in his usual environment") was deemed to have been satisfied].)

but the true identity of the witness was known to the defendant prior to trial, allowing the defendant "effectively to investigate and impeach the declarant"]; *United States v. Dyman* (2d Cir.1984) 739 F.2d 762, 772-773 [where the defendant failed to object to nondisclosure of the witness's address or explain the need for it, and the address already was known to the defense, the defendant was not prejudiced by the witness's failure at trial to state the address]; *Clark v. Ricketts* (9th Cir.1991) 958 F.2d 851, 854-855 [the trial court's refusal to allow a government informant to be cross-examined regarding his true name and address was upheld where the prosecution had disclosed the witness's true name to the defendant prior to trial, thereby allowing the defense to investigate the witness]; *United States v. Chavez-Vernaza* (9th Cir.1987) 844 F.2d 1368, 1376-1377 [there exists no right to have the home address of immunized government witnesses stated in court, where the witnesses provided their true names, occupations, and professional backgrounds, as well as their involvement with the defendant, and where the defendant was allowed to obtain the witnesses' addresses outside the presence of the jury].)[9]

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9. Judicial decisions rendered by our sister state courts and cited by the People similarly are unpersuasive. (See *State v. Novosel* (N.H. 1980) 412 A.2d 739 [upholding nondisclosure of witness's new, out-of-state, address, where the witness was defendant's father-in-law and the crime was committed at the father-in-law's former residence]; *Marshall v. State* (Fla. 1992) 604 So.2d 799 [upholding nondisclosure at trial of the identity of a witness to a jailhouse murder, to protect the witness against possible retaliation from other inmates, where the witness's identity was disclosed to the defendant prior to trial].)

Our own survey of the relevant decisions rendered by our sister state courts has failed to locate a single case upholding nondisclosure at trial of the identity of a crucial prosecution

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Significantly, in all those decisions in which a witness's name or address was deemed crucial, or the prosecution failed to allege a basis for nondisclosure of identifying information, the courts uniformly have concluded that disclosure at trial is required. (See, e.g., *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 386 [in a case involving "a single informant witness whose

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9. (...continued)
witness. (See *State v. Baumann* (1980) 125 Ariz. 404, 410-411 [610 P.2d 38, 44-45]; *People ex rel. Dunbar v. District Ct. Of Seventh J.D.* (1972) 177 Colo. 429 [494 P.2d 841, 843]; *State v. Hassberger* (Fla.1977) 350 So.2d 1, 5; *Timberlake v. State* (1980) 246 Ga. 488 [271 S.E.2d 792, 800-801]; *People v. Manzella* (1973) 56 Ill.2d 187 [306 N.E.2d 16, 19-20], disapproved on another point in *People v. Huckstead* (1982) 91 Ill.2d 536 [65 Ill.Dec. 232, 237, 440 N.E.2d 1248, 1253]; *People v. Jones* (1987) 155 Ill.App.3d 641 [108 Ill.Dec. 196, 201-202, 508 N.E.2d 357, 362-363]; *Crull v. State* (Ind. 1989) 540 N.E.2d 1195, 1198-1200; *Johnson v. State* (Ind. 1988) 518 N.E.2d 1073, 1065-1076; *State v. Sheffey* (Iowa 1977) 250 N.W.2d 51, 55; *State v. Hutchinson* (1977) 222 Kan. 365 [564 P.2d 545, 548]; *State v. Thornton* (La. 1975) 309 So.2d 266, 266-268; *Commonwealth v. McGrath* (1973) 364 Mass. 243 [303 N.E.2d 108, 113-114]; *People v. Pleasant* (1976) 69 Mich.App. 322 [244 N.W.2d 464, 466]; *State v. Caldwell* (1975) 303 Minn. 297 [227 N.W.2d 382, 386]; *State v. Glass* (Mo.Ct.App.1977) 554 S.W.2d 426, 428; *Greene v. State* (1980) 96 Nev. 555 [612 P.2d 686, 687-688]; *State v. Vandebogart* (1994) 139 N.H. 145 [652 A.2d 671, 681]; *People v. Stanard* (1977) 42 N.Y.2d 74 [396 N.Y.S.2d 825, 830-832, 365 N.E.2d 857, 861-864]; *State v. McNeil* (1990) 99 N.C.App. 235 [393 S.E.2d 123, 128-129]; *State v. Capone* (1975) 115 R.I. 426 [347 A.2d 615, 621-622]; *State v. Grooms* (S.D.1993) 504 N.W.2d 111, 112- 115; *Winkle v. State* (Tex.Ct.App.1972) 488 S.W.2d 798, 799-800; *State v. Berard* (1974) 132 Vt. 138 [315 A.2d 501, 507-509]; *State v. Mannhalt* (1992) 68 Wash.App. 757 [845 P.2d 1023, 1027-1028].)

credibility was central to the defense," defendant was deprived of his right of cross-examination by the withholding of the witness's address]; *United States v. Hernandez* (9th Cir.1979) 608 F.2d 741, 744-746 [where the principal prosecution witness participated in the events that were critical to the prosecution's case, the identity of the witness could not lawfully be withheld from the defendants, but there was no reversible error in permitting the witness to withhold his address prior to disclosure on cross-examination at trial]; see also *United States v. Fischel* (5th Cir.1982) 686 F.2d 1082, 1092-1094 [where the government failed to allege any reason for withholding an informant's address from the defendant, the address should have been disclosed]; *United States v. Palermo* (7th Cir.1969) 410 F.2d 468, 472 [even if the trial court concludes for reasons related to the safety of the witness that the defendant does not have a right to be provided with the witness's address and place of employment, "[u]nder almost all circumstances, the true name of the witness must be disclosed"]; *United States v. Fuentes* (E.D. Penn. 1997) 988 F.Supp. 861 [holding that the prosecution could not withhold the identity of its principal witness from the defense, notwithstanding the circumstance that disclosure would place the witness and his family in danger].)

In short, although the People correctly assert that the confrontation clause does not establish an *absolute* rule that a witness's true identity always must be disclosed, *in every case in which the testimony of a witness has been found crucial to the prosecution's case the courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination*. (Accord, *Roviaro v. United States, supra,* 353 U.S. 53 [when an informant is a material witness on the issue of guilt, the prosecution must disclose his or her identity or incur a dismissal]; *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851-853 [when an informant is a material witness to the crime of which the

defendant is accused, the prosecution must disclose the informant's name and whereabouts]; *People v. Garcia* (1967) 67 Cal.2d 830 [same].)[10]

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10. The People also urge us to find persuasive the concurring opinion of Justice White in *Smith*, *supra*, 390 U.S. 129, 133-134. (See fn. 8, *ante*.) As noted, Justice White suggested that under proper circumstances such as a threat to the personal safety of a witness (an issue not addressed in *Smith*), the witness might be excused from answering questions that "tend to endanger the personal safety of the witness" without violating the defendant's right of confrontation. (*Smith, supra,* 390 U.S. at pp. 133-134; see also Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth* (1963) 3 Wash. U. Law. Q. 279, 292-295 ["In the rare case, the denial of all discovery may be compelled to protect the safety of witnesses or prevent apparent perversion of the judicial process."].) Justice White's concurring opinion in *Smith* did not suggest, however, that the testimony of a crucial witness could be admitted while withholding his or her identity, when nondisclosure of the witness's identity would significantly impair the defendant's ability to investigate and cross-examine the witness. (See also *Siegfriedt v. Fair*, *supra*, 982 F.2d 14, 17 ["[T]he *Smith* standard has a core purpose: to prevent a criminal conviction based on the testimony of a witness who remains 'a mere shadow' in the defendant's mind. [Citation.] When that core purpose is not implicated, we see no reason for reflexively excluding otherwise admissible testimony . . . . Sometimes, as in *Smith* itself, a witness' use of a fictitious name will transform him into a wraith and thereby thwart the efficacy of cross-examination. Other times, the use of a fictitious name will be no more than a mere curiosity, possessing no constitutional significance." (Fn. omitted.)]; accord, *Clark v. Ricketts*, *supra*, 958 F.2d 851, 854-855; *United States v. Ellis*, *supra*, 468 F.2d 638, 639; *United States v. Palermo*, *supra*, 410 F.2d 468, 472; *United States v. Twoomey*, *supra*, 400 F.2d 400, 401; *State v. Florez* (N.J. 1994) 636 A.2d 1040 ["informant's privilege" protecting the identity of a certain

(continued...)

In the present case, the defense argues that the witnesses whose identities are at issue clearly are crucial witnesses whose veracity and credibility are likely to be central to the prosecution's case. As noted, the witnesses' grand jury testimony suggests they were in close proximity to the murder and witnessed events related to the charged offenses. Thus, under the cases discussed above, should the witnesses provide such crucial testimony at trial, the confrontation clause would prohibit the prosecution from relying upon this testimony while refusing to disclose the identities of the witnesses under circumstances in which such nondisclosure would significantly impair the defense's ability to investigate or effectively cross-examine them.

D

The People contend that, although they have not identified the witnesses in question by their true names, the impact of such nondisclosure has been mitigated by the prosecution's submission of other relevant information to the defense, including the module, row, and cell number occupied by each of the witnesses at the time of the crime as well as the witnesses' criminal histories. (See *People v. Marshall* (1996) 13 Cal.4th 799, 842 [a witness's credibility may be impeached extensively with evidence of his or her prior criminal history and involvement in other crimes, and of the inducements for the witness's testimony].) The People maintain that in view of the disclosures

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10. (...continued)
witness must yield when the informer is an essential witness on a basic issue in the case]; cf. *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 679 [cross-examination of the witness always is subject to a trial judge's broad discretion to impose reasonable limits on interrogation "based upon concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"].)

made to the defense, the witnesses can be placed in their proper setting ___ i.e., as jail inmates ___ and that further disclosures are unnecessary.

In response, defendants contend that the limited information provided to them is inadequate to permit effective cross-examination. Defense counsel insist that without access to the witnesses' identities, they will be unable to determine whether the witnesses (1) were present at the time and place of the killing, (2) harbored grudges against either or both defendants, (3) had a motive to kill the victim themselves and accuse defendants in order to dispel suspicion from themselves, (4) made inconsistent statements to others regarding relevant aspects of the case, and (5) had reputations for dishonesty.

We already have explained that the order presently on review, insofar as it relates to *pretrial* discovery, represents a reasonable exercise of discretion under Penal Code section 1054.7 and a "conscientious effort" (*People v. Lopez*, *supra*, 60 Cal.2d at p. 247) to balance the defense's need for information before trial against the realistic danger to the witnesses inherent in premature disclosure. At *trial*, however, the confrontation clause imposes greater demands upon the prosecution in that defendants must be afforded an adequate opportunity to confront and cross-examine effectively the witnesses who testify against them. As we have seen, even the Court of Appeal majority opined that without knowledge of the witnesses' identities, defense counsel "will have difficulty obtaining complete information about the witnesses' location and ability to observe and testify about the crime[,] . . . [and] will be unable to [obtain] complete impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own charges." Indeed, without access to either the witnesses' names or their photographs, defense

counsel are unlikely to be able to conduct an adequate investigation of the witnesses or of the veracity of their testimony, or challenge the accuracy of the information concerning the witnesses provided by the prosecution, including their prior criminal records or the benefits that may have been provided to them in return for their testimony.

The People further contend that once the crucial witnesses appear in court at trial, defendants "can advise their attorneys of any prior contacts with these witnesses and any other information they might have concerning these witnesses," and that at that point defendants may be able to obtain a continuance in order to investigate the witnesses. The trial court's order in this case, however, is based upon the premise that the witnesses' identities need not be disclosed at trial under any circumstances. We do not believe such an order can be defended, without full consideration ___ in light of the relevant evidence and circumstances ___ of the defense's need for affirmative disclosure, solely on the assumption that the witnesses' appearance at trial in any event will reveal their identities.[11]

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11. Although they did not raise the issue in the trial court, the People now contend that even if the trial court's order authorizing permanent nondisclosure otherwise would be impermissible, defendants, by threatening certain witnesses, waived any constitutional right to obtain disclosure of the witnesses' identities. For a variety of reasons, we believe this claim lacks merit.

First, there is no evidence in the record that links defendant Lopez to any threats, and thus even under the People's theory there is no basis for finding a waiver on his behalf.

Second, although evidence was introduced at the in camera hearing, from which the defense was excluded, indicating that defendant Alvarado personally had threatened a witness, Alvarado

(continued...)

Accordingly, we conclude that the trial court erred in ruling, on the record before it, that the witnesses in question may testify anonymously at trial.[12]

As emphasized at the outset of this opinion, we are keenly aware of the serious nature and magnitude of the problem of witness intimidation.[13] Further, we agree that the state's

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11. (...continued)
had no opportunity to contest the evidence or litigate the issue, because the People did not otherwise raise the waiver theory in the trial court. All of the cases upon which the People rely in support of their waiver theory hold that a valid waiver cannot be found absent a full hearing on the point in question. (See, e.g., *United States v. Thai* (2d Cir. 1994) 29 F.3d 785, 814.)

Third and finally, the trial court's finding that the safety of the witnesses would be endangered by disclosure of their identities was based upon the premise that the danger to the witnesses was posed by the Mexican Mafia, *not* by the individual defendants in this case. Under this circumstance, we do not believe that the denial of disclosure can be sustained on a waiver theory.

12. In so concluding, we should not be understood as precluding the trial court, as this case proceeds, from reassessing any question with regard to disclosure of the identities of these witnesses. Much may have happened in the considerable time that has elapsed since the trial court's order, or may happen between now and the time of trial, that may affect the necessity for a disclosure order. For example, the prosecution may choose not to present one or more of the witnesses, the witnesses may be unavailable, or the witnesses may choose voluntarily to disclose their names to defense counsel at a pretrial interview.

13. At oral argument, the People pointed out that during the past five years in Los Angeles County alone, the prosecution has
(continued...)

13. (...continued)
filed special circumstance allegations stemming from the murder of witnesses in 25 cases, is investigating 1,600 cases of witness intimidation, and "can't get witnesses to come forward in over 1,000 gang murders. Why? Because we cannot protect them [the witnesses]."

The use of violence and intimidation by criminal gangs to immunize themselves from the criminal justice system is by no means a recent phenomenon. (See, e.g., Invasions of Privacy: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong. 1st Sess., pt. 3, at p. 1157 (1965) [testimony of former United States Attorney General Nicholas Katzenbach regarding acts perpetrated by organized crime].) For example, the Mexican Mafia, referenced throughout the findings made by the trial court in support of its nondisclosure order (***ante***, at pp. 6-7), has been described as one of the oldest prison gangs in the United States, dating back to 1957. (Lyman, Gangland: Drug Trafficking by Organized Criminals (1989) p. 53.) It is believed to exist in several states, with its membership estimated to be about 600 members. (***Id.***, at p. 54.) In California, the Mexican Mafia has been characterized as "a highly organized, well structured, and rather sophisticated organization . . . ." (U.S. Dept. of Justice, Off. of Legal Policy, Prison Gangs, Their Extent, Nature and Impact on Prisons (1985) p. 97.) It relies upon "violent tactics to conduct business" (***ibid.***); "one requirement for membership is for prospects to murder without question." (Lyman, ***supra***, at p. 54; see also Rohrlich & Tulsky, ***Gang Killings Exceed 40% of L.A. Slayings: Intimidation of witnesses allows hundreds of suspects to walk free. Prosecutors try to break the cycle,*** L.A. Times (Dec. 5, 1996) p. A1, col. 4 ["More than a thousand gang killers are walking the streets of Los Angeles. [¶] Witness intimidation helps keep them there. . . . [¶] More and more gang killers ___ responsible for about 40% of Los Angeles County's murders ___ remain free."]; Corwin, ***Grief Galvanizes Mothers to Seek Crime Witness Aid***, L.A.
(continued...)

ability to afford protection to witnesses whose testimony is crucial to the conduct of criminal proceedings is an absolutely essential element of the criminal justice system. As we have explained, a trial court has broad discretion to postpone disclosure of a prospective witness's identity in order to protect his or her safety, and may restrict such pretrial disclosure to defense counsel (and ancillary personnel) alone.

A trial court also retains broad discretion to control courtroom proceedings in a manner directed toward promoting the safety of witnesses. (See, e.g., § 868.7, subd. (a)(2) [upon motion of the prosecutor, a magistrate may close the examination of a witness "[w]hose life would be subject to a substantial risk in appearing before the general public"]; see also § 686.2 [authorizing the trial court to remove any spectator who is intimidating a witness]; § 867 [authorizing the magistrate to exclude potential and actual witnesses upon motion of either party]; § 868 [authorizing the magistrate to exclude the public upon the request of the defendant and a finding by the magistrate "that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial"]; *People v. Woodward* (1992) 4 Cal.4th 376, 382-386 [upholding the temporary closure of the courtroom to additional spectators during a murder trial, in view of the "unusual security risks" posed by the trial]; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*

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13. (...continued)
Times (Oct. 19, 1997) pp. B1, col. 2, B8, cols. 1-4 [observing that gang-related murders often remain unsolved because the witnesses are afraid to come forward].)

The court's decision in the present case is limited to addressing defendants' legal claims regarding the propriety of the trial court's nondisclosure order. We recognize that our decision cannot and will not alleviate the serious problem of witness intimidation.

(1999) 20 Cal.4th 1178, 1222, fn. 46 [noting that among the "overriding interests" that may justify closure of a courtroom in an appropriate instance is the protection of witnesses from intimidation].)

The state retains numerous other means of affording protection to a potential witness, including the provision of protective surveillance and housing, relocation, documents to establish a new identity, and the transfer of an incarcerated witness to another prison, either within or outside of California. (See, e.g., §§ 14020 et seq. [establishing state Witness Protection Program and authorizing reimbursement to local entities for witness-protection expenses], 11189 et seq. [adopting Interstate Corrections Compact authorizing confinement of inmates in other states].)[14] Although none of the measures specifically authorized by these legislative enactments can guarantee the safety of a witness, they do provide mechanisms by which the state can help reduce the risks that he or she faces. Furthermore, the state vigorously may enforce the numerous stringent criminal sanctions that are available against witness harassment and intimidation. (See, e.g., §§ 136 et seq. [establishing a variety of witness intimidation offenses], 190.2, subd. (a)(10) [authorizing the death penalty for the murder of a witness to a crime "who was intentionally killed for the purpose of preventing his or her testimony in a criminal or juvenile proceeding"]; *People v. Jones* (1996) 13 Cal.4th 535, 550 [holding that the witness-killing special circumstance applies to the killing of any witness who might testify in a criminal proceeding]; see also *People v. Jenkins*

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14. Defendant Lopez requests that this court take judicial notice of the November 1999 California State Audit of the California Witness Protection Program. That document is subject to judicial notice under Evidence Code section 452, subdivision (c), and we grant his request. (Evid. Code, § 459.)

(2000) 22 Cal.4th 900, 1018 [rejecting the argument that the witness-murder special circumstance is inapplicable where "the victim was not an important witness in the criminal proceeding"].)

As has been established by the judicial decisions that we have discussed above, however, the state's legitimate interest in protecting individuals who, by chance or otherwise, happen to become witnesses to a criminal offense cannot justify depriving the defendant of a fair trial. Thus, when nondisclosure of the identity of a crucial witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity. As this court observed more than 40 years ago, "However praiseworthy was the prosecution's motive in protecting the [witness] from the threat of reprisal[,] [s]uch motives and purposes cannot prevail when, as here, they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial." (*People v. Kiihoa* (1960) 53 Cal.2d 748, 754.)

V

As we have explained, the serious threat to the witnesses' safety disclosed by the evidence presented by the prosecution in this case clearly justified delaying disclosure of the witnesses' identities to the defense, but the trial court's order went beyond constitutional bounds in determining that, notwithstanding the significant impairment of defendants' ability to investigate or cross-examine the witnesses or the apparently crucial nature of the witnesses' proposed testimony, the prosecution could withhold the identities of "witnesses 1, 2, and 3" from the defense for the duration of the proceedings and have them testify anonymously at trial. Accordingly, we reverse the judgment of the Court of Appeal insofar as it upholds this aspect of the trial court's order.

We conclude that the trial court should be directed to vacate the challenged order and, because that order was entered some time ago and a variety of circumstances ___ including the location and situation of the witnesses ___ may have changed materially in the interim, the trial court should be permitted to fashion a revised order in light of the conclusions expressed in this opinion.

VI

For the reasons set forth above, we reverse the judgment of the Court of Appeal and remand the matter to that court with instructions to issue a writ directing the trial court to vacate the challenged order, and to conduct further proceedings and issue a new order consistent with the reasoning set forth in this opinion.

GEORGE, C.J.

WE CONCUR:
MOSK, J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

A-46

Filed 11/15/00

IN THE SUPREME COURT OF CALIFORNIA

JOAQUIN ALVARADO,	)S059827
Petitioner,	)Ct. App. 2/1
	)No. B103406
v.	)
THE SUPERIOR COURT OF	)Los Angeles County
LOS ANGELES COUNTY,	)
Respondent;	)Super. Ct. No.
	)BA099774
THE PEOPLE,	)
Real Party in Interest.	)
	)
JORGE LOPEZ,	)S059827
Petitioner,	)Ct. App. 2/1
v.	)No. B1034561
THE SUPERIOR COURT OF	)
LOS ANGELES COUNTY,	)Los Angeles County
Respondent;	)Super. Ct. No.
	)BA099774
THE PEOPLE,	)
Real Party in Interest.	)
	)

The opinion herein, appearing at 23 Cal.4th 1121, is modified as follows:

The following is inserted as a new footnote 2, immediately following the first sentence of the second full paragraph on page 1128; the succeeding footnotes are renumbered accordingly:

> "The prosecution also provided the defense with information describing the witnesses' custodial

status, and the police reports of their prior crimes. Copies of reports of interviews of other inmates also were made available to the defense. Additionally, the prosecution provided the names and photographs of 33 other inmates who, on the date of the murder, resided in the county jail module where the killing occurred. Defendants also were provided with the names of every other inmate who resided in a nearby county jail module."

This modification does not effect a change in the judgment.

No. S059827
IN THE SUPREME COURT OF CALIFORNIA
REMITTITUR

JOAQUIN ALVARADO,	)S059827
Petitioner,	)Ct. App. 2/1
v.	)No. B103406
THE SUPERIOR COURT OF	)Los Angeles County
LOS ANGELES COUNTY,	)
Respondent;	)Super. Ct. No.
	)BA099774
THE PEOPLE,	)
Real Party in Interest.	)
	)
JORGE LOPEZ,	)S059827
Petitioner,	)Ct. App. 2/1
v.	)No. B1034561
THE SUPERIOR COURT OF	)
LOS ANGELES COUNTY,	)Los Angeles County
Respondent;	)Super. Ct. No.
	)BA099774
THE PEOPLE,	)
Real Party in Interest.	)
	)

I, FREDERICK K. OHLRICH, Clerk of the Supreme Court of the State of California, do hereby certify that the attached are copies of the original judgment now final entered in the above-entitled cause on August 17, 2000.

WITNESS MY HAND AND OFFICIAL SEAL OF THE COURT, November 15, 2000

SEAL FREDERICK K. OHLRICH, Clerk

By N. ROBINSON
DEPUTY

60 Cal.Rptr.2d 854, 52 Cal.App.4th 939, Alvarado v. Superior Court, (Cal.App. 2 Dist. 1997)

*854 60 Cal.Rptr.2d 854

Previously published at 52 Cal.App.4th 939

52 Cal.App.4th 939, 65 USLW 2555, 97 Cal. Daily Op. Serv. 985,

97 Daily Journal D.A.R. 1417

Joaquin ALVARADO, Petitioner,

v.

The SUPERIOR COURT, Respondent,

The PEOPLE, Real Party in Interest.

Jorge LOPEZ, Petitioner,

v.

The SUPERIOR COURT, Respondent,

The PEOPLE, Real Party in Interest.

Nos. B103406, B103561.

Court of Appeal, Second District, Division 1, California.

Feb. 10, 1997.

As Modified on Denial of Rehearing March 7, 1997. (FN*)

Review Granted May 14, 1997.

Inmates charged with jail-house murder of third inmate petitioned for writ of mandate after the Superior Court, Los Angeles County, No. BA 099774, Robert J. Perry, J., denied requests for discovery of photographs and identities of three witnesses who cooperated with prosecution. The Court of Appeal, Ortega, Acting P.J., held that death threats to witnesses and prison gang reputation for killing informants justified denial of defense discovery requests, notwithstanding resulting limitations upon defendants' right to confront witnesses.

Writ petitions denied and remanded.

Masterson, J., dissented and filed opinion.

*855 Klein & Crain and Michael M. Crain, Santa Monica, Richard H. Millard, Tara Selver, Los Angeles, and Robert S. Gerstein, Santa Monica, for Petitioners.

No appearance for Respondent.

Gil Garcetti, District Attorney, Brent Riggs and Brentford J. Ferreira, Deputy District Attorneys, for Real Party in Interest.

ORTEGA, Acting Presiding Justice.

How far will the justice system go to try to protect the life of a witness who has been threatened with death? In this murder prosecution, the trial court determined that the defense would be denied discovery of the identities of three witnesses, and

rejected the defense's request for photographs of the witnesses. We conclude the trial court was correct, even though the witnesses are crucial to the prosecution's case and one of the two defendants has not been linked to the death threats. The defense has been provided all other discovery concerning the witnesses, including their grand jury testimony and criminal histories. The witnesses will be produced before trial for interviews. They will testify at trial in the presence of the defendants, without disguises.

We agree with defendants that this limitation on discovery will significantly hamper their defense efforts, and we analyze the issue from that perspective. But we determine that when a witness' life is at stake, an appropriate balance can be struck, with the judicial system doing its best to assure a defendant a fair trial under the circumstances while at the same time endeavoring to protect the witness.

Our dissenting colleague has chosen to elevate procedure over the witnesses' welfare. We decline to adopt a position which purports to determine that the lives of some witnesses are more valuable than those of others. We reject the fortuity of saying to one witness that we will protect him because he is peripheral while turning our backs on another because he is central. We find illogical the premise that pure happenstance determines whether we will endeavor to protect one person (e.g., the peripheral witness or the witness whose death threats can be tied to a defendant) and abandon another person (e.g., the crucial witness or one whose death threats cannot be tied to a defendant). We do not purport to arrogate unto ourselves the power to place relative values on the lives of threatened witnesses.

Our analysis leads us to conclude that the crucial factor to be determined by the trial court is whether a witness has been threatened and is actually in mortal danger. Once a trial court has so determined on the basis of sufficient evidence, it is

not an abuse of discretion to deny to the defense photographs of the witness or the witness' true name.

*856 We do not reach the question of whether, under such circumstances, it would be an abuse to give the defense such information. We leave resolution of that issue to another time and another case. Nor do we reach the question of whether a trial court may deny to the defense more than a photograph and the witness' true name. We confine ourselves to the circumstances before us.[1]

FACTS AND PROCEDURAL HISTORY

Defendants Joaquin Alvarado and Jorge Lopez are charged with murdering Jose Uribe. The murder occurred in Los Angeles County Jail while all three men were inmates. According to the evidence before the trial court, the Mexican Mafia prison gang ordered Uribe killed because he was an informant or "snitch." Alvarado and Lopez are not Mexican Mafia members, but murdered Uribe to curry favor with, and perhaps gain membership in, the gang. Three other jail inmates were the only eyewitnesses to the murder.

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1. Because we uphold the permanent nondisclosure of the names and photographs, both before and during trial, we need not address the propriety of withholding the information beforehand, but disclosing it during trial. (See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51-54, 107 S.Ct. 989, 998-1000, 94 L.Ed.2d 40 [cf. conc. opn. of Blackmun, J., id. at pp. 61-65, 107 S.Ct. at pp. 1003-1006, and dis. opn. of Brennan, J., id. at pp. 66-72, 107 S.Ct. at 1006-1009]; *People v. Marshall* (1996) 13 Cal.4th 799, 841, 55 Cal.Rptr.2d 347, 919 P.2d 1280; *People v. Webb* (1993) 6 Cal.4th 494, 517-518, 24 Cal.Rptr.2d 779, 862 P.2d 779.)

Uribe was murdered on February 6, 1993. He was beaten and stabbed 37 times with a contraband prison knife known as a shank. A complaint charging Alvarado, Lopez, and Frank Marquez with Uribe's murder was filed on August 13, 1993[2]. The prosecution provided discovery to the defense from which identifying information for its three crucial witnesses was deleted. The magistrate ordered that information disclosed to the defense eight weeks before the preliminary hearing.

Instead, the prosecution took the case to the grand jury, which returned an indictment on August 23, 1994. Alvarado is charged with murder with the special circumstance that he previously committed another murder, and conspiracy to commit murder. The prosecution is seeking the death penalty against Alvarado. Lopez is charged with murder, conspiracy to commit murder, and possessing a shank while in custody on three other occasions unrelated to this case. The prosecution provided defendants with transcripts of the grand jury proceedings. In those transcripts, the three inmate eyewitnesses are identified only as witnesses 1, 2, and 3.

According to the transcript, Uribe was housed in cell 10 of a particular jail module and row. When Uribe was murdered, the cells on that row generally housed eight inmates. Uribe was murdered in his cell during a noon lunch period.

Witness 2 told the grand jury that, on the morning of Uribe's murder, Marquez, a jail trustee, came to cell 11 where witness 2 was housed. Marquez spoke to some of witness 2's cellmates in Spanish. Although witness 2 is not Hispanic, he understood some Spanish and believed Marquez said a snitch was going to be dealt with and they should stay away from cell 10.

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2. Marquez is not a party to this proceeding.

About ten minutes later, witness 2 heard a black trustee tell some black inmates to stay away from the end of the row where cell 10 was located. Based on these statements and other inmates' actions, witness 2 knew no one was to go near cell 10. Nonetheless, witness 2 stayed alone in his cell around noon instead of going to lunch because he wanted to eat food he had bought that morning at the commissary.

Around noon, witness 2 saw Alvarado and Lopez, who were not assigned to cell 10, enter that cell with another inmate who was housed there. Witness 2 then heard a fight inside cell 10 and words about being a snitch. Other inmates made noise to drown Uribe's cries. When other inmates returned from lunch, witness 2 saw Lopez give his bloody shirt to Marquez outside cell 10. Witness 2 also saw a bloody body under a bed inside cell 10. Marquez told witness 2 to return to his cell because the matter did not involve *857 him. Witness 2 knew Lopez and Marquez from earlier contact.

Two days after the murder, witness 2 was shown photos of inmates who had been in the area. Witness 2 identified Lopez, Marquez, and a third inmate as the second person who entered cell 10 with Lopez. Alvarado's picture was not in the group. Later, witness 2 identified Alvarado's picture as the second man who accompanied Lopez, and said his earlier identification of the third inmate was mistaken.

Witness 1 testified that on the day of the murders he was housed in cell 12. Although also not Hispanic, witness 1 understood some Spanish. Witness 1 heard Marquez ask one of his Hispanic cell mates for some extra jail clothing and say something about a snitch. Witness 1 gave Marquez his shirt, hoping to curry favor with Hispanic inmates. Witness 1 stayed alone in his cell during lunch because he was tired and felt like sleeping. Witness 1 saw a group of five inmates, including

Alvarado and Lopez, near his cell. He then heard a fight, but no covering noise, and saw the same group of five inmates leave the area.

Witness 1 identified Marquez' photo two days after the murder, but six months later identified someone else as the trustee to whom he gave his shirt. Witness 1 told the grand jury Alvarado and Lopez were in the group of five inmates he saw near his cell, although he admitted confusion regarding his earlier identification of their photos. Witness 1 also testified that the day before his testimony, he was put into the same jail cell as Alvarado, who threatened to harm him if he testified.

Witness 3, a jail trustee like Marquez, testified he was assigned to sweep the module containing cells 10-12. On the morning of the murder, witness 3 saw Marquez wrap a shank inside a shirt and give it to another Hispanic inmate. After lunch, witness 3 saw Marquez take a shirt from someone on the same row.

The prosecution provided the defense with the grand jury transcripts and all other information about the case and the witnesses, including their criminal histories, except the names and photographs of witnesses 1-3. The prosecution also agreed to disclose any gang nicknames used by the witnesses. The defense continued to seek the witnesses' true names and photographs. Although the prosecution is required to disclose, thirty days before trial, the names and addresses of all witnesses to be called at trial (Pen.Code, ss 1054.1, subd. (a); 1054.7)[3], the prosecution sought a protective order permitting the permanent nondisclosure of the identities and photographs of witnesses 1-3 because such disclosure to defendants or their attorneys would place the

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3. Unless otherwise noted, all further section references are to the Penal Code.

witnesses' lives in danger. (s 1054.7.)

Over defendants' objections, the trial court held a series of in camera hearings, from which the defense was excluded, to permit the prosecution to demonstrate good cause why disclosure of witnesses 1-3's names and photos should be denied. These hearings were authorized by section 1054.7, which provides in relevant part: "The disclosure required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred.... 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [p] Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding[ ]. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ...."

Based on the evidence produced at these hearings, the trial court made the following factual findings: (1) The Mexican Mafia ordered Uribe's murder. Uribe was killed only a day or two after arriving in the jail, and the orchestrated attack reinforces the conclusion that organized criminals caused his death. *858 Alvarado and Lopez are not Mexican Mafia members but committed the murder to curry favor with the gang. (2) The Mexican Mafia is infamous for retaliating against informants. From 1988 to 1991, the gang ordered twelve completed or attempted murders of inmates, including those in protective custody or in custody in other states. The gang also was linked to five additional murders of people not in custody. (3) The Mexican Mafia can obtain confidential information about people both in

and out of custody through an extensive intelligence network, including sources inside many public agencies. The gang's penetration of penal institutions is so great it is considered by some to be in de facto control of them. The gang has ordered so many murders and there are so many witnesses in protective custody that the state cannot adequately protect them all. (4) The Mexican Mafia requires documentation before an informant death contract will be approved. At least two members must approve the contract after an informal trial including review of transcripts indicating the person was an informant. This need for documentation demonstrates the importance of knowing the informant's true name. (5) One of the witnesses was attacked and warned against testifying by an inmate aligned with the Mexican Mafia. Alvarado threatened a witness while he was in protective custody. While one of the witnesses was in court, someone wrote on his cell wall that he was dead.

Based on these findings, the trial court concluded that good cause for permanent nondisclosure of the witnesses' true names and photos had been clearly established because their participation in the case placed them in serious danger which would be increased by disclosure of their names. The trial court acknowledged its ruling would preclude the defense from fully investigating the witnesses' background and history and would limit the effectiveness of the defense's cross-examination of the witnesses.

The trial court made the following order: 1) the names of the three witnesses will be permanently withheld from the defense; 2) the prosecution must produce the witnesses for interview by defense counsel thirty days before trial. The witnesses are not required to speak to defense counsel, but if they do, they may, but are not required to, disclose their names; 3) if defense counsel learn the witnesses' names, they may not disclose the names to defendants; and 4) at trial, the witnesses may, but are

not required to, disclose their names, and their appearance will not be disguised.

Before trial, Alvarado and Lopez sought writ review of this order. We issued an order to show cause so we could review the order.

DISCUSSION

[1] In this pretrial writ petition, Alvarado and Lopez do not challenge the trial court's finding that disclosure of the witnesses' names will seriously increase their risk of death above what they already face. They do not claim the finding is unsupported by sufficient evidence, nor do they challenge their exclusion from the hearing. Defendants also do not challenge the criminal discovery statutes under which the trial court operated. (ss 1054-1054.7, enacted as part of Proposition 115 on June 5, 1990.) Rather, defendants argue that pretrial nondisclosure violates the Sixth Amendment confrontation clause as made applicable to the states through the Fourteenth Amendment Due Process clause, and that nondisclosure at trial violates the confrontation clause. Defendants argue this nondisclosure significantly reduces the effectiveness of their investigation and resulting cross-examination of the witnesses.

'The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas* [1965] 380 U.S. 400 [401, 403, 85 S.Ct. 1065, 1066-1067, 1068, 13 L.Ed.2d 923]. Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'

[Citation.]" (*Davis v. Alaska* (1974) 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347.)

The Davis majority reversed a criminal conviction in which the defendant was precluded from *859 cross-examining a crucial prosecution witness about his status as a juvenile probationer at the time of the crime and at trial. The defendant argued the witness' probationary status may have caused him to fear the police would suspect him of the crime and resulted in distorted or false testimony through a desire to gain favor with the authorities. The trial court precluded the questions because a state statute guaranteed the privacy of juvenile records. The Davis court found the permitted cross-examination insufficiently effective (id. at pp. 317-318, 94 S.Ct. at pp. 1110-1111), and the witnesses' privacy right to avoid embarrassment outweighed by the defendant's right to effective cross-examination (id. at pp. 319-320, 94 S.Ct. at pp. 1111-1112.) The Davis court's analysis emphasized the witness' denial of any anxiety when confronted by the police, and concluded the witness might have answered differently had his probationary status been exposed. (Id. at pp. 311-314, 94 S.Ct. at pp. 1107-1109.) There was no claim the denied cross-examination would expose the witness to any danger beyond embarrassment.

In *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, the majority reversed Smith's conviction for selling drugs to a police informant. The alleged sale occurred in a restaurant, and only Smith and the informant testified to what happened. Police officers testified the informant entered the bar with marked money and no drugs, and left with drugs and no money. The officers found one of the marked bills on Smith during his arrest. Smith claimed he directed the informant to someone else in the restaurant who must have sold him the drugs, and must have gotten the marked bill as change when he bought coffee. On cross-examination, the informant admitted the name

under which he testified was false. The trial court sustained the prosecution's unspecified objection to the defendant's inquiry regarding the informant's true name. The Smith court found the limitation on cross-examination violated Smith's confrontation right. There was no showing the inquiry would have in any way endangered the witness. Indeed, two concurring justices noted "that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. [We] would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question.

The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason [we] join the Court's judgment and its opinion which, as [we] understand it, is not inconsistent with these views." (Id. at pp. 133-134, 88 S.Ct. at p. 751 (conc. opn. of White, J.), emphasis added.)

The Smith court relied on its earlier opinion in *Alford v. United States* (1931) 282 U.S. 687, 691-694, 51 S.Ct. 218, 219-220, 75 L.Ed. 624. The Alford court likewise reversed a conviction where the trial court precluded Alford from asking a crucial prosecution witness his address. Again, there was no showing the inquiry would in any way endanger the witness.

"Where, however, there is a showing that disclosure would endanger the personal safety of the witness, the court has discretion to deny disclosure of the information. [Citations.]" (*People v. Watson* (1983) 146 Cal.App.3d 12, 20, 193 Cal.Rptr. 849.) In Watson, the preliminary hearing magistrate precluded

the defendant from asking a crucial prosecution witness the witness' address when the prosecutor presented evidence that answering would place the witness in danger. The trial court dismissed the case. (s 995.) The appellate court reversed because, although the prosecution failed to meet its burden of showing danger to the witness, the defendant was not prejudiced because the witness was otherwise adequately impeached.

Likewise, *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 7 Cal.Rptr.2d 76 upheld nondisclosure of crucial witnesses'addresses and telephone numbers because "the prosecution made a showing of sufficient danger of *860 threats or harm to the witnesses, and the defense did not plausibly allege that the witnesses' veracity in their community was at issue." (Id. at p. 764, 7 Cal.Rptr.2d 76.) Moreover, in Montez the adequate showing of danger involved " 'harass[ment]' " of a witness and his family, seeing the defendant's associates in court, and being fearful. (Id. at p. 771, 7 Cal.Rptr.2d 76.) That showing, found sufficient in Montez, pales next to the actual threats and attacks against these witnesses and the evidence of the Mexican Mafia's organized and successful policy of murdering those who give evidence against it.

In *People v. Castro* (1979) 99 Cal.App.3d 191, 160 Cal.Rptr. 156, the court affirmed the conviction and held the trial court properly denied disclosure of a crucial witness' address, both because of numerous threats against the witness and because the witness was adequately impeached. (Id. at pp. 200-204, 160 Cal.Rptr. 156.) The court in *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 384-387, 159 Cal.Rptr. 456 applied the same test and ordered a case dismissed where the preliminary hearing magistrate had denied disclosure of a crucial witness' address. The court so held because the prosecution provided no evidence of potential witness danger other than a conclusory claim that disclosure would subject the witness to harassment.

Only one case rejected this balancing approach, and its supporting United States Supreme Court authority. In *People v. Brandow* (1970) 12 Cal.App.3d 749, 90 Cal.Rptr. 891, the primary witness against the defendant, who was charged with pandering, was an admitted former prostitute who was permitted to testify under an assumed name. The trial court did so because the prosecution presented what the Brandow court described as "extensive evidence that the witness' life was in danger and that revealing her true identity or information from which it might be learned would unduly enhance the danger." (Id. at p. 754, 90 Cal.Rptr. 891.) The appellate court noted that the right to disclosure can give way to a proper showing of actual witness danger and did not challenge the showing made. Without citation to authority, the court simply concluded that, where there is not sufficient independent evidence of guilt, and the case turns on the competing credibility of the witness and the defendant, no balancing of interests was possible, and the witness' identity must be disclosed to guarantee the defendant a fair trial. We reject this opinion because it failed to follow the authorities it cited, which support nondisclosure where, as in Brandow, an admittedly adequate showing of actual witness danger is made. As discussed in more detail below, we also reject its assumption that witnesses must be exposed to serious death threats by permitting no limits on cross-examination.

Federal cases are in accord. While some uphold limitations because the witnesses were of marginal importance, many involve important witnesses, and all apply the balancing test used here: the more important the witness, the greater must be the showing of witness danger, and the more narrowly drawn the limits on disclosure, to justify nondisclosure. All these cases upheld limitations on cross-examination and disclosure of various identifying information. (*Clark v. Ricketts* (9th Cir.1991) 958 F.2d 851, 854-855; *United States v. Varella* (11th Cir.1982) 692 F.2d 1352, 1355-1356; *United States v. Rangel* (9th Cir.1976)

534 F.2d 147, 148; *United States v. Cosby* (9th Cir.1974) 500 F.2d 405, 407; *United States v. Ellis* (9th Cir.1972) 468 F.2d 638, 639; *United States v. Jordan* (4th Cir.1972) 466 F.2d 99, 102; *United States ex rel. Abbott v. Twomey* (7th Cir.1972) 460 F.2d 400, 401-402.)[4]

*861 We now apply these rules to the facts before us. First, we reject the People's argument that, given the extensive discovery already provided, permanent non-disclosure of the witnesses' names does not seriously limit defendants' effective investigation and cross-examination of the witnesses. Defendants will have difficulty obtaining complete information about the witnesses' location and ability to observe and testify about the crime. Moreover, defendants will be unable to obtain complete impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own

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4. The dissent's attempts to distinguish these cases ignore that the only cases rejecting discovery limits where there is a valid finding of witness danger are Brandow and the dissent. The dissent's "rule" is that witness danger is irrelevant unless any proposed discovery limitation relates to trivial information. Only then, under the dissent's rule, would potential witness danger even be considered. As discussed above, the actual rule is that "[w]here . . . there is a showing that disclosure would endanger the personal safety of the witness, the court has discretion to deny disclosure of the information. [Citations.]" (*People v. Watson,* supra, 146 Cal.App.3d at p. 20, 193 Cal.Rptr. 849.) As discussed elsewhere in our opinion, the dissent attacks the sufficiency of the evidence supporting the trial court's witness danger finding, and the procedures which produced it, despite the absence of such defense challenges. Apparently, although it does not say so, the dissent would hold the trial court abused its discretion on these facts in denying disclosure of the witnesses' names and pictures.

charges. These limitations are particularly important because the victim, defendants, and witnesses all are inmates, the witnesses are crucial to the prosecution, and their credibility or its lack may well determine the outcome. While, as discussed below, the information provided to the defense will permit much investigation and cross-examination, we agree with the defense that, in this case, permanent nondisclosure of the witnesses' names significantly impairs their confrontation and due process rights.

[2] Second, we reject the People's argument, raised for the first time on appeal, that defendants waived their constitutional confrontation and due process rights by threatening the witnesses. This argument is based on cases in which the defendants made or orchestrated the threats. As discussed above, no evidence links Lopez to any of the threats. Thus, this argument does not apply to him. Alvarado, of course, personally threatened a witness. However, where credible, serious threats to kill crucial witnesses exist, and disclosure of their names would put them in mortal danger, we conclude the source of the threats does not affect whether to impose, or the extent of, limits on defense discovery. (See, among others, *U.S. v. Thai* (2d Cir.1994) 29 F.3d 785, 814-815; *United States v. Thevis* (5th Cir.1982) 665 F.2d 616, 630-633; *United States v. Carlson* (8th Cir.1976) 547 F.2d 1346, 1353-1359.) While these cases may provide a separate rationale for upholding discovery limits against a claim that they violate defendants' constitutional right to prepare or present effective cross-examination where the defendants utter or direct the threats, we do not rely on them here. In any event, the prosecution did not raise this issue in the trial court. Issues raised for the first time on appeal which were not argued in the trial court are waived. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, ss 311-315, pp. 321-327.)

We recapitulate the salient facts. First, after conducting the in camera hearing contemplated by section 1054.7,

the trial court found good cause for nondisclosure of the three witnesses' names clearly established because their participation placed them in serious danger and disclosure of their names would likely increase their danger.

Second, these undisputed findings are supported by extensive, detailed factual findings, including that Alvarado personally threatened and attacked one of the witnesses before his grand jury testimony; both of the other witnesses received specific threats designed to dissuade them from testifying; the Mexican Mafia contracted for Uribe's murder, and the defendants, although not Mexican Mafia members, committed the murder to gain favor, and perhaps membership in the gang, the Mexican Mafia thus being motivated to protect even nonmembers who do its bidding; the Mexican Mafia deliberately retaliates against informants through its extensive intelligence and informant network, and requires some evidence of their status as informants based on their true names; and the witnesses cannot be protected by protective custody placement.

Thus, our analysis is based on the following undisputed facts: 1) These witnesses are crucial, essential prosecution witnesses without whom the state has no viable case. The witnesses cannot be labeled peripheral, cumulative, or minor. 2) Disclosure of the witnesses' true names and photographs unquestionably will significantly increase the likelihood that the witnesses will be killed.[5]

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5. Defendants did not challenge, on any ground, the sufficiency or accuracy of this evidence and the resulting findings or the procedures which produced them. Thus, we neither address nor determine the standard of proof the prosecution must meet to demonstrate witness danger. Likewise, we neither address nor determine the adequacy of the procedures under which the trial court operated. (ss 1054, subd. (d); 1054.2; 1054.7.)

*862 Third, we emphasize that the only information being denied to defendants is the witnesses' true names and photographs. Their criminal histories have been produced, with identifying information deleted. The witnesses will be produced for pretrial interviews with defense counsel, at which they may choose voluntarily to disclose their names. Of course, like other California criminal trial witnesses, they may refuse to be interviewed. Alvarado threatened witness 1 and thus obviously knows who he is, although Alvarado may not know his name. Nothing prevents Alvarado from sharing his information with his counsel and co-defendants. The other witnesses have been threatened and thus have been identified within the jail population. Moreover, the trial court's order specifically states the witnesses will testify in full view of defendants in open court, without visual or audio disguise.[6] Thus, much information has been and will be provided to the defense, enabling them to investigate the witnesses and conduct cross-examination. This information will help defendants give the jury a more complete picture of the witnesses. Only some information is being withheld, and that only on an uncontested showing that the nondisclosed information, above that already provided, will place the witnesses in mortal danger. This limited nondisclosure, in the face of such a proven and potentially lethal threat of witness danger, satisfies the careful balancing of interests required by the Constitution.

The defendants' constitutional rights are not absolute, and must be balanced with other fundamental interests. No one seriously disputes that society's ability to protect those

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6. We offer no opinion as to how the trial court should rule should either defendant seek a continuance after the witnesses have finished testifying at trial to conduct further investigation based on the witnesses' appearance and tesitmony.

who witness crimes and give evidence and enforce its criminal sanctions against crimes like murder are such fundamental interests. Credible threats to kill crucial prosecution witnesses to major crimes seriously and adversely affect that interest in at least three ways. First, if successful before trial, these defendants, if culpable, would completely escape responsibility for Uribe's murder, which then would go unpunished. Second, these particular defendants and others contemplating crime would be emboldened to use such threats to insulate themselves from accountability for other crimes. Third, even if not successful until after trial, witnesses to other crimes would be cowed. The result would be injustice in particular cases, a significant increase in criminality and violence, and eventual victory for the forces of social disintegration and anarchy.

These are not speculative, theoretical concerns. Criminal gangs, including the Mexican Mafia, have infiltrated not only prisons but the entire law enforcement and prosecutorial apparatus. They control criminal activity in the prisons and jails, and drug trafficking both in and out of the prison system. The trial court's similar findings are supported by the undisputed evidence before us. Recent newspaper articles describe the current federal RICO and conspiracy trial of several Mexican Mafia leaders, gang control of drug trafficking, extortion, and murder, and society's increasing inability to control crime, through lowered arrest, charging, and conviction rates, and the increasing use of witness intimidation to further the power and unaccountability of individual and organized criminals. (Rohrlich & Tulsky, Gang Killings Exceed 40% of L.A. Slayings: Intimidation of witnesses allows hundreds of suspects to walk free. Prosecutors try to break the cycle, L.A. Times (Dec. 5, 1996) p. A1, col. 4; Russel, La Eme: Murder, mayhem, and the Mexican Mafia: Can the Feds really cripple America's deadliest prison gang?, L.A. New Times (Dec. 12-18, 1996) vol. 1, no. 17, p. 6; Rohrlich & Tulsky, Efforts to Protect Witnesses Fall Short in L.A. County[.]

Homicide: Proposals to strengthen the system go nowhere. People increasingly are too *863 scared to testify, L.A. Times (Dec. 23, 1996) p. A1; Krikorian, Case of Teacher's Shooting Dropped After 2 Trials[.] Courts: Juries deadlocked both times. When a key witness softened his testimony, prosecutors implied there was intimidation from defendants' gang, L.A. Times (Jan 28, 1997) p. B3; Ramos, Witness Tells of His Life in Prison Gang[.] Trial: Star prosecution informant . . . describes his assaults for the Mexican Mafia, L.A. Times (Jan 30, 1997) p. B1.)

These articles disclose the reality behind the issue before us. "More than a thousand gang killers are walking the streets of Los Angeles. [p] Witness intimidation helps keep them there. [p] Witnesses have been killed and many more threatened, as frustrated police have been unable to protect them. [p] Many residents of gang-dominated neighborhoods are too terrorized to come forward, and their reluctance feeds a deadly cycle. [p] Without reliable witnesses, police and courts are powerless. More and more gang killers--responsible for about 40% of Los Angeles County's murders--remain free." (Rohrlich & Tulsky, Gang Killings Exceed 40% of L.A. Slayings, supra, p. A1.)

"[L]aw enforcement officials say that not even the most secure prison cell in the state can squelch the influence of the Mexican Mafia--or, as it is more commonly known on the street, la Eme, the Spanish pronunciation of the letter M. For nearly four decades the clandestine organization, with an estimated 400 members and several hundred more associates inside and outside prison, has used fear and intimidation to control prostitution, gambling, narcotics smuggling, and extortion in California's prison system. [p] . . . [p] The archives of prison lore are full of examples of the organization's leaders managing to relay their often-deadly orders with relative ease, using corrupt guards as couriers, visitors and parolees to relay coded messages to the outside, and inmate transferees to communicate between prisons.

(Sources say two guards at the federally operated Metropolitan Detention Center were fired after being suspected of smuggling heroin since the arrival there of the alleged Mafia leaders.) . . . [p] Adding to their frustration, investigators say, is that relatives and girlfriends of Mafiosos are known to work within the court system in such agencies as the state Department of Motor Vehicles, giving la Eme the potential to gather information about law enforcement officers, and prosecutors, among others. The organization even tries to infiltrate police ranks. For instance, a background check of a female applicant to the LAPD in November revealed her boyfriend to be a suspected Mafia associate." (*Russel, La Eme, supra,* p. 8.)

"Two juries had deadlocked in favor of acquittal of Frazier Francis and Antonio Moses, both 19[, in their attempted murder trial for shooting a teacher through a school window during a retaliatory gang shooting]. In both cases the key witness--who had originally told police he saw one of the suspects fire a gun--softened his testimony. [p] Both trials were laced with implications of gang intimidation of the witness. . . . After Monday's court proceedings in Compton Superior Court, defendant Moses' father talked bluntly about his belief that friends of his son had sent menacing signals to [the witness]. [p] 'He's off the hook now,' said A.C. Moses. During the first trial, the elder Moses had predicted to a reporter that [the witness] would 'probably be iced' if either defendant were convicted. [p] 'I know [the witness] is glad this is all over,' Moses said from his home Monday.

[p] ... [p] On the witness stand in both trials, however, [after telling the police he saw Moses order Francis to shoot at the rival gang member, the witness] denied that he ever saw the shooting, saying he had only heard the shots. In response to prosecutors' questions, he said he had heard he was 'gonna get

my head blown off' if the suspects were convicted." (Krikorian, Case of Teacher's Shooting Dropped After 2 Trials, supra, p. B3.)

"Ernest 'Chuco' Castro ... testified about his own criminal career, how he joined the [Mexican Mafia] prison gang, how he killed and assaulted others on the organization's behalf and, ultimately, why he left La Eme, as the prison gang is called on the streets.

[p] ... He left La Eme knowing that cooperating with authorities meant he was marked for death by the prison gang.... [p] ...

[p] During stints at several California *864 state prisons ... Castro assaulted several members believed to be on La Eme's hit list. . . . He said he never questioned such an order. [p] 'Anyone who is on [the] La Eme hit list has to be stabbed,' he said, adding that he agreed to commit the assaults 'to get recognition from La Eme.' [p] ... [p] Castro, who was convicted and served time for voluntary manslaughter for one alleged Mexican Mafia-sanctioned hit, is in the federal witness protection program and is awaiting sentencing on state weapons charges." (Ramos, Witness Tells of His Life in Prison Gang, L.A. Times (Jan 30, 1997) pp. B1, col. 6, B3, cols. 5-6.)

Our dissenting colleague dismisses the gang threat described in these articles and the evidence before the trial court as the "threat du jour." (Dis. opn. of Masterson, J., post, at p. 870.)

That death threats might represent a "threat du jour " is of small comfort to a witness whose identity is uncovered and who is subsequently hunted down and killed. The California Supreme Court apparently recognizes this threat as more than a "threat du jour," approving severe restrictions on gang members' association and movement rights as part of injunctions designed to reclaim whole neighborhoods essentially occupied by gangs.

(People ex rel. *Gallo v. Acuna* (1997) 14 Cal.4th 1090, 60 Cal.Rptr.2d 277, 929 P.2d 596.)

Because its description and analysis of the problem are acutely relevant to our case, we quote from the opinion at some length.

"Rocksprings" is an urban war zone. The four-square-block neighborhood, claimed as [gang] turf ..., is an occupied territory.

Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.

"The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and

their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden." (*People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at p. 1100, 60 Cal.Rptr.2d 277, 929 P.2d 596 [slip opn., pp. 1-2], emphasis added.)[7]

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7. Without attempting to dispute the facts discussed in these articles and by our Supreme Court, and documented in the evidence heard by the trial court, or citing any contrary information, the dissent suggests the crime problem posed by criminal gangs, and specifically their use of witness intimidation and retaliation, is an illusory or transitory "threat du jour." (dis. opn. of Masterson, J., post, at p. 870.) The thrust of this characterization is that, like earlier, presumedly "unfounded" fears of anarchists or internal subversion, the gang problem is exaggerated, and thus should receive little or no weight in balancing society's interest in protecting witnesses and prosecutions against defendants' fair trial rights. We wonder if anyone intrigued by this suggestion would entertain it if the conditions described in these articles, the evidence before the trial court, and our Supreme Court in *People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th 1090, 60 Cal.Rptr.2d 277, 929 P.2d 596, existed in his neighborhood or affected his family, neighbors, and co-workers. We think these conditions sufficiently real and verifiable, especially absent contrary information, to trump suggestions that our concern for witness safety is the product of overreacting, ideological rigidity, or paranoia. Recent events likewise disclose the reality behind similar threats by armed right-wing "militias" involving destruction of federal buildings and threats to judges and prosecutors as well as private citizens.

In any event, even if the problem of such death threats is "du jour " and thus merely transitory (which we do not

(continued...)

*865 Without doubt, the discovery limits in the instant case significantly and adversely affect defendants' constitutional rights. Likewise without doubt, the danger that crucial prosecution witnesses to a murder are far more likely to be killed, before or after testifying, if defendants are given this disputed information, significantly and adversely affects society's fundamental interests. Thus, this case compels us to balance the defendants' constitutional fair trial and confrontation rights with society's and witnesses' fundamental rights to hold criminals responsible for their conduct through fair trials at which all percipient witnesses can testify without fear of death from criminal gangs. Under such circumstances, no authority compels the disclosure of these witnesses' true identities and photographs.

Defendants focus on a single point: Once the witness is crucial, no discovery limits are permitted. Ignoring the other crucial point, i.e., that in light of serious threats, without these limits the witnesses will be killed, regardless of the source of the threats, defendants do not even attempt to balance these fundamental interests, but simply subordinate society's fundamental interest to their own. The defendants ignore or, through innuendo, dismiss the amount of discovery they will receive. Under the defendants' analysis, it would not matter how great or small the discovery limitations were, if the witness is crucial. We think it matters that much discovery has been and will be produced, and that the witnesses will testify openly without hoods or voice distortion, although we do not suggest that such

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7. (...continued)
concede), it would not change our result. Whether this problem will abate tomorrow or last forever is immaterial. As we have stated earlier, whenever a witness' life is at stake, we can strike an appropriate balance between trying to protect him and giving a defendant the best possible trial under the circumstances.

greater limitations might never be upheld, depending on the seriousness of the threat.

Courts routinely balance criminal defendants' constitutional rights against society's fundamental right to fair trials resulting in true verdicts based on full evidentiary records. Thus, otherwise voluntary statements taken from criminal defendants in violation of their Fifth Amendment privilege against self-incrimination (*Miranda v. Arizona (1966)* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), nonetheless may be admitted to impeach the defendants' contrary trial testimony. (*Harris v. New York* (1971) 401 U.S. 222, 226, 91 S.Ct. 643, 646, 28 L.Ed.2d 1; *People v. May* (1988) 44 Cal.3d 309, 243 Cal.Rptr. 369, 748 P.2d 307.) Unlike defendants and the Brandow court, we carefully balance these competing interests, as the cases instruct. We do not subordinate one to another.[8]

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8. The dissent's footnote 2, while essentially conceding that individual constitutional rights can be balanced against fundamental societal interests, suggests that such communal rights have no constitutional basis. Without explaining why, the dissent concludes that the People's California Constitutional due process right (Cal. Const., art. I, s 29) does not provide such support, despite the dissent's reliance on the federal due process clause to extend individuals' federal confrontation right to state proceedings.

In any event, despite their source, such fundamental societal rights are recognized as limiting individual constitutional rights:

"Often the public interest in tranquillity, security, and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual. In this case, however, the true nature of the trade-off becomes painfully obvious." (*People ex rel. Gallo v. Acuna, supra,* 14 Cal.4th at p. 1102, 60 Cal.Rptr.2d 277, 929 P.2d 596 [slip opn., p. 4].)

Moreover, while frequently giving lip service to the undisputed nature of our factual record and the lack of a challenge to the procedures which produced it, the defense, through innuendo, suggests these undisputed facts are unreliable. For example, they suggest that expenditure of greater funds would permit the witnesses to be protected if their identity were disclosed. Of course, there is no evidence that, given the Mexican Mafia's tentacles, even relocated witnesses would be safe. Further, how much would society have to spend to come as close as the defense requires to absolute witness protection? The *866 defense suggests that, unless we can absolutely guarantee witness safety, our feeble efforts are wasted. If so, they conclude, since we cannot do everything, we cannot do anything.

[3] [4] The defense's analysis leads to the anomalous result that discovery limits may be placed on peripheral, but not crucial, witnesses. Put another way, the defense says we may protect unimportant witnesses but not crucial ones. We do not draw that lesson from the cases. If limits are to be placed on defendants' constitutional rights, they must be narrowly drawn only to accommodate equally compelling fundamental interests. We think the better rule is that any witness, whether crucial or peripheral, faced with serious threats to his safety, regardless of their source, may be protected by carefully crafted discovery limits, narrowed to permit as much discovery and cross-examination as feasible under the circumstances. Here, given the discovery that has been and will be produced, the trial court properly refused to disclose the witnesses' true identities and photographs. We do not suggest that greater limits could never be acceptable, or that more discovery could never be required. We leave that analysis to different cases presenting different facts. We reluctantly acknowledge that we cannot assure absolute safety to any witness. We insist only that we not indulge ourselves in a game of judicial roulette with witnesses' lives. If the danger is mortal, the overriding consideration is protection of the witness' life.

We conclude the trial court properly exercised its discretion by carefully balancing these fundamental interests. The trial court found that disclosure of these crucial prosecution witnesses' names and likenesses would place them in mortal danger, regardless of the danger's source. That finding is not challenged. We think that discovery limitation, given the wealth of disclosed information, sufficiently narrowly crafted to withstand constitutional scrutiny.

DISPOSITION

We deny the writ petitions, dissolve the previously granted stay, and remand the matter for trial.

MIRIAM A. VOGEL, J., concurs.

MASTERSON, Justice, dissenting.

I dissent.

I start, as does the majority, from the basic precept that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347.) "It is the essence of a fair trial that reasonable latitude be given the cross-examiner. . . . Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations.]" (*Alford v. United States* (1931) 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624.)

As the case now stands, defendants are subject to convictions of first degree murder, with Alvarado facing a sentence of death. This can happen based on the testimony of witnesses whose identities have not been disclosed to them or their attorneys. Without doubt, this lack of disclosure places formidable hurdles in the path of an investigation of the memories and perceptions of these witnesses. The main thrust of defendants' argument to this court, however, is that nondisclosure impermissibly limits their ability to discredit the witnesses by

the basis for impeachment. This, they urge, is of great importance to their defense. The reason is readily apparent.

"Snitching" against the Mexican Mafia appears to be a capital offense in the parallel society that gangs are recognized as having created within this state's penal institutions. Given the prominence and power of the Mexican Mafia and other established prison gangs, it is a wonder that any inmate would ever come forward to identify the perpetrators of a murder, especially of an alleged *867 snitch. That such witnesses do come forward may speak well of them, as they seem to give society help in bringing culpable parties to justice. But given the culture within which the homicide in this case was committed, certain questions arise as to why witnesses Nos. 1, 2 and 3 chose to cooperate with law enforcement officials. A sense of duty and respect for human life could be one answer. Animus, group loyalty, or self-interest could be others.

It is possible that the witnesses in this case are members of, affiliated with, or seeking to impress one of the Mexican Mafia's rival gangs. (See *Dawson v. Delaware* (1992) 503 U.S. 159, 165, 112 S.Ct. 1093, 1097-1098, 117 L.Ed.2d 309 [evidence that tenets of a prison gang required its members to lie, cheat, steal and kill to protect each other is admissible to show bias]; *People v. Garnica* (1981) 121 Cal.App.3d 727, 730-731, 175 Cal.Rptr. 521 [groups considered inimical to Nuestra Familia, which maintains "hit lists" of enemies, include the Mexican Mafia].) It could also be that the witnesses are unaligned with a prison gang, but nonetheless have a personal score to settle with the defendants. Equally plausible is the possibility that one or more of the witnesses was motivated by the desire to be placed in protective custody so that he could carry out gang activities from

within that setting,[1] or that he wanted to be in protective custody because he felt himself in danger for reasons he did not want to disclose, or that he wanted special attention for some unrelated, and perhaps irrational, reason. Any or all of such information would be invaluable to the defense in seeking to discredit the testimony of these witnesses by impugning their credibility.

This need for complete preparation by the defense is underscored by the many vexing questions that arise from the evidence thus far presented. For example, why were misidentifications made from the photographs shown to the witnesses? Why did witnesses Nos. 1 and 2 stay in their cells rather than go to lunch on the day of the killing? Why did only one of them see other inmates with Alvarado and Lopez or hear the shouts of others while Uribe was being killed? Why was witness No. 1 put in the same cell as Alvarado just before the witness's testimony before the grand jury?

While it is possible that there are innocent explanations for all of these questions, traits of honesty and personal responsibility are not usually the hallmarks of state or local prisoners. Penal institutions are fertile grounds for artifice and deceit. The ability to prove that witnesses Nos. 1, 2 and 3 are deceitful, if evidence to support that position exists, would be a key component of Alvarado's and Lopez's defense. It is inconceivable that such a defense could be adequately developed without knowing the identities of those to be investigated.

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1. Evidence was received in municipal court discovery proceedings that prison gang members often seek to be placed in protective custody in order to accomplish a mission with respect to other inmates who are similarly housed.

The majority pays no more than lip service to this reality. After having acknowledged the existence of this impediment to defense preparation, the majority "emphasize[s]" the limited nature of the information being withheld, i.e., the witnesses' names and photographs. (Maj. opn., ante, p. 862.) It also seeks to lessen the impact of the information by suggesting that defendants probably know who the witnesses are. The majority cannot have it both ways. The order of nondisclosure is premised on the assumption that defendants are not able to identify the witnesses. If this assumption is incorrect and defendants know the witnesses' identities (a reasonable possibility given the evidence and findings regarding the Mexican Mafia's extensive intelligence network), the order of nondisclosure is of no practical consequence. If, however, defendants do not know who the witnesses are (the assumption that we are bound to accept), the fact that the nondisclosure may be "limited" is of no consequence because, as readily conceded by the majority, even limited nondisclosure will "significantly impair[ ]" the defendants' ability to present their case to the jury. (Id. at p. 861.)

The majority recites case law as if there were an almost unbroken line of authority permitting denial of confrontation in order to protect witness safety. I see the law differently. *868 To be sure, "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1020, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857.) However, no case has held that confrontation may be denied where the witnesses are key to the prosecution, there is reason to suspect that factual bases may exist for attacking the credibility of these witnesses, and the denial of confrontation may deprive a defendant of the opportunity to develop such facts. In other words, a case such as this where a defendant's ability to present his case would be, as the majority puts it, "significantly impaired."

Each of the cases cited by the majority in support of the order of nondisclosure is distinguishable. In *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 7 Cal.Rptr.2d 76, the trial court conditioned disclosure of the identities of four "civilian" witnesses to a gang murder upon a showing that the credibility of the witnesses was at issue. The defendant did not attempt to make such a showing and the court ultimately denied his request that the witnesses' identities be disclosed. (Id. at pp. 771-772, 7 Cal.Rptr.2d 76.) In *People v. Castro* (1979) 99 Cal.App.3d 191, 160 Cal.Rptr. 156, the court denied the defendant's mid-trial request for the current address of a police informant who testified that he had sold drugs to the defendant. In upholding the order, the Castro court noted that denial of a witness's address is improper only where it deprives the defendant of the opportunity to place the witness in his proper setting and test his credibility. (Id. at pp. 202-203, 160 Cal.Rptr. 156.)

Through cross-examination of the informant and presentation of three of his own witnesses, the defendant in Castro was able to place the informant in his proper setting and raise serious questions about his credibility, even without knowing the informant's address. (Id. at pp. 203-204, 160 Cal.Rptr. 156; see also *People v. Watson* (1983) 146 Cal.App.3d 12, 20-21, 193 Cal.Rptr. 849 [defendant not deprived of substantial preliminary hearing right when material witness's address not disclosed because other evidence placed witness in his proper setting].)

The federal cases relied on by the majority are similarly distinguishable. (See *Clark v. Ricketts* (9th Cir.1991) 958 F.2d 851, 854-855 [defense knew prosecution's John Doe witness's true name and criminal record well in advance of trial]; *United States v. Varella* (11th Cir.1982) 692 F.2d 1352, 1356 [disclosure of identity of informants who were not "integral participants" in the underlying transaction not required]; *United States v. Rangel* (9th Cir.1976) 534 F.2d 147, 148 [nondisclosure of informant's name on the ground of witness safety upheld

without discussion of informant's importance to the case]; *United States v. Cosby* (9th Cir.1974) 500 F.2d 405, 407 [same]; *United States v. Ellis* (9th Cir.1972) 468 F.2d 638, 639 [defendant properly precluded from eliciting correct name, residence and occupation of agent-purchaser of drugs who was of "marginal significance" to the prosecution's case]; *United States v. Jordan* (4th Cir.1972) 466 F.2d 99, 102 [reversal not warranted where names of eyewitnesses to jailhouse knife attack on another inmate not disclosed because, inter alia, victim positively identified defendant as assailant and defendant's alibi defense debunked by testimony of prison guards]; *United States ex rel. Abbott v. Twomey* (7th Cir.1972) 460 F.2d 400, 401-402 [informant who was not a principal or chief witness to drug transaction not required to reveal his true identity, residence and place of business].)

The case that the majority claims does not follow the law is *People v. Brandow* (1970) 12 Cal.App.3d 749, 90 Cal.Rptr. 891. There, the defendant was charged with pandering. The main prosecution witness was a former prostitute who was cooperating with the police under an assumed name. The trial court refused to permit the defendant to cross-examine the witness as to her true identity on the ground that such disclosure would put her life in danger. (Id. at pp. 751-754, 90 Cal.Rptr. 891.) Citing *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, the Court of Appeal reversed, finding that witness credibility was the "fulcrum upon which the determination of the defendant's guilt or innocence must be balanced," and that the failure to disclose the witness's true identity thus denied the defendant his right to a fair trial. (*People v. Brandow*, *869 *supra*, 12 Cal.App.3d at p. 755, 90 Cal.Rptr. 891; see also *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 385, 159 Cal.Rptr. 456.)

Brandow 's failing, according to the majority, is that it did not apply a balancing test but rather ruled that where important confrontation rights are at stake the balancing of interests is not permitted. Although Brandow is terse in its analysis, I fail to see where it purports to establish an absolute rule. Rather, the Brandow court noted that the trial court had "balanc[ed] the defendant's constitutional interests against the protection of the witness' physical safety" (12 Cal.App.3d at p. 754, 90 Cal.Rptr. 891) and reached its conclusion only after considering "the circumstances" of the case (id. at p. 755, 90 Cal.Rptr. 891)[2].

The majority suggests that the position taken in this dissent would illogically protect witnesses who are peripheral to the prosecution case while permitting the safety of important

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2. The majority speaks of the proper balance as one to be achieved by weighing "criminal defendants' constitutional rights against society's fundamental right to fair trials...." (Maj. opn., ante, p. 865.) To the extent this characterization implies a constitutional "right" on the part of the People, it is misleading. In analogous situations, the balancing equation has been described in a number of ways that recognize society's interests. (E.g., *People v. Zapien* (1993) 4 Cal.4th 929, 975, 17 Cal.Rptr.2d 122, 846 P.2d 704 ["the defendant's right to effective cross-examination against the public's interest in effective prosecution"]; *People v. Hobbs* (1994) 7 Cal.4th 948, 957, 30 Cal.Rptr.2d 651, 873 P.2d 1246 ["the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant's right of reasonable access to information upon which to base a challenge to the legality of a search warrant"].) However, there is no federal constitutional provision on which these expressions of society's interests rely, nor do the recently adopted California People's rights to due process of law and to speedy and public trials (Cal. Const., art. I, s 29) appear to address this issue.

witnesses to be placed in jeopardy. This suggestion demonstrates the failings of the majority's position. It is true that giving different levels of protection to witnesses who are subject to the same level of danger appears incongruous. However, the majority fails to note that where a witness is peripheral or his credibility is not in issue, the weight on the defendant's side of the balancing equation is significantly diminished. Thus, it is precisely when competing interests are appropriately balanced that a peripheral witness may be entitled to more protection than a witness who is crucial to the prosecution's case.

I frankly cannot envision a situation that would warrant permanent nondisclosure where the obstacle it presents to the defense is as severe as exists here. But the procedural context from which the instant order emanated is perhaps responsible for misleading the trial court into thinking it was proper. The order arose from a finding of good cause under Penal Code section 1054.7, a statute that is part of Proposition 115's "pretrial discovery" scheme. (See Pen.Code, s 1054.) Under this provision, the trial court found that the witnesses "are in serious danger as a result of their participation in this case and that the disclosure of their names would likely increase the danger to them." I see the thornier question as being whether the trial court's finding might justify the withholding of the witnesses' identities as part of pretrial discovery. However, the quantum of danger found here would not distinguish this situation from myriad other cases and thus appears inadequate to justify the permanent nondisclosure that the trial court ordered.[3]

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3. It also bears mention that, in addition to trying to dissuade adverse witnesses from testifying, it is also part of the Mexican Mafia's arsenal to retaliate against such witnesses once their testimony has been given. Here, although the likelihood that the

(continued...)

I close by referencing the majority's statement that I have chosen by this dissent to "elevate procedure over the witnesses' welfare." (Maj. opn., ante, p. 855.) The statement is colorful but inaccurate. I have tried to make it clear in the foregoing that what I advocate is not a procedure but rather an adherence to a process which has served us well for generations.

*870. Probably the greatest strength we have as a society is our ability to overcome the real or perceived threat du jour, whether it be organized crime in the '30's, claims of internal subversion in the '50's, or terrorism and militia groups in the '90's. We survive these by dealing with them within the framework of our democratic institutions, not the least of which are those guarantees of a fair trial that I see damaged by the majority opinion. Of course the temptation is ever present to abridge these guarantees when faced, as the majority puts it, with "forces of social disintegration and anarchy." (Id. at p. 862.) The dangers to the witnesses in this case and in many other cases are real. But as a society we have survived much, and we will surely survive the threat posed by the gang activity of today. The greater danger is if we overreact and accept an abridgment of liberty foreign to our history and tradition. For if we do that, we shall harm ourselves more than any gang or group of gangs ever could.

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3. (...continued)
People will be able to bring this case to trial may be enhanced by the order of nondisclosure, once the witnesses have appeared in open court and thereby been subjected to the scrutiny of the Mexican Mafia's extensive intelligence network, what protection the nondisclosure order previously afforded could well be rendered meaningless.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

JOAQUIN ALVARADO,	)No. B103406
Petitioner	)
v.	)
LOS ANGELES COUNTY	)(Super. Ct. No.
SUPERIOR COURT,	) BA099774)
Respondent;	)Los Angeles County
THE PEOPLE OF THE	)
STATE OF CALIFORNIA,	)
Real Party in Interest.	)
_____	)
JORGE LOPEZ,	)
Petitioner,	)No. B103406
v.	)
LOS ANGELES COUNTY	)(Super. Ct. No.
SUPERIOR COURT,	) BA099774)
Respondent;	)Los Angeles County
THE PEOPLE OF THE	)
STATE OF CALIFORNIA	)
Real Party in Interest.	)
_____	)

Pursuant to real party in interest's request, we hereby stay issuance of remittitur in the above entitled matters while the People petition for certiorari to the United States Supreme Court.

The real party in interest shall file with this Court a copy of the order granting or denying certiorari petition within 2 days of receipt.

_____
Acting Presiding Justice

California statutes involved in the issues

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Cal. Penal Code, § 187, subd. (a) (1994).

California Penal Code § 190.2 (a)(2):

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances had been found under section 190.4 to be true.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of the paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree. (Current version of Cal. Penal Code, § 190.2 (a)(2).)

California Penal Code § 182 (a)(1):

(a) If two or more persons conspire:
(1) To commit any crime. (Cal. Penal Code § 182 (a)(1)

California Penal Code § 41874 (a):

(a) Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give such authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison or prison road camp or prison forestry camp, or

other prison camp or prison farm or any other place where prisoners or the state prison are located under the custody of prison officials, officers or employees, or any jail or any county road camp in this state, or within the grounds belonging or adjacent to any such institution, any firearms, deadly weapons, or explosives, and any person who, while lawfully confined in a jail or county road camp possesses therein any firearm, deadly weapon, explosive, tear gas or tear gas weapon, is guilty of a felony and punishable by imprisonment in the state prison for two, three, or four years. (Cal. Penal code § 4874 (a).)

California Penal Code § 1054.1, reads in pertinent part:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following . . . information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call at trial. . . . (Cal. Penal Code § 1054.1.)

California Penal Code § 1054.2, reads in pertinent part:

(a)(1) Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause.

"(2) Notwithstanding paragraph (1), an attorney may disclose or permit to be disclosed the address or telephone number of a victim or witness to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by an attorney shall be

informed by the attorney that further dissemination of the information, except as provided by this section, is prohibited.

"(3) Willful violation of this subdivision by an attorney, persons employed by the attorney, or persons appointed by the court is a misdemeanor."

California Penal Code § 1054.5, provides in pertinent part:

"(a) No order requiring discovery shall be made in criminal cases except as provided in this chapter. . . . [¶] (b) Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired material and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. . . ."

Section 1054.7 provides in pertinent part:

The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . . 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [¶] Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. (Cal. Penal Code § 1054.2.)